

IN THE MATTER OF THE ARBITRATION BETWEEN

The State of Ohio

Department of Transportation

AND

The Ohio Civil Service Employees

Association, AFSCME Local 11

GRIEVANT: Keith Crumley

GRIEVANCE NO.: 31-13-(04-19-13)16-01-07

OPI NION AND AWARD
ARBITRATOR: Meeta Bass Lyons

AWARD DATE: March 27, 2014

APPEARANCES FOR THE PARTIES

EMPLOYER:

Edward Flynn, Employer Advocate, First Chair

Stephanie Fuller, Second Chair

Gail Lindeman, Third Chair

UNION:

Jim Beverly, Union Advocate, First Chair

John Gersper, Second Chair

Grievant: Keith Crumley

PROCEDURAL HISTORY

The Ohio Department of Transportation is hereinafter referred to as "Employer". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Keith Crumley is the Grievant.

Grievance No. 31-03(04-19-13)16-01-07 was submitted by the Union to Employer in writing on April 16, 2013 pursuant to Article 24 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2012-2015 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on January 23, 2014 in Ashland, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered. The parties submitted post-hearing briefs on or before February 7, 2014. The hearing record was closed on February 7, 2014.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator.

The parties did stipulate to the issue as follows: Was the grievant Keith Crumley removed for just cause? If not, what should the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases, which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04.

24.02 - Progressive Discipline

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

24.05 - Pre-Discipline

Prior to the (pre-disciplinary) 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 the time and documents known of at the 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 be provided to the Union and the employee prior to the meeting.

25.01 (H)- Process

Oral reprimands shall be grievable through step two. Written reprimands shall be grievable through step three. If an oral or written reprimand becomes a factor in the first subsequent disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the oral or written reprimand.

25.03 - Arbitration Procedures

The parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

25 CFR 1926

1926.32(f)

"Competent person" means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are

unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

1926.651(j) Protection of employees from loose rock or soil.

1926.651(j)(1) Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

1926.651(j)(2) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

1926.651(k) Inspections.

1926.651(k)(1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

1926.651(k)(2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

JOINT DOCUMENTS

1. Collective Bargaining Agreement
2. Discipline Trail
3. Grievance Trail
4. Investigation Report, Ed Waters
5. Supplemental Investigation report, John Shore
6. ODOT Work Rules WR101
7. 2004 Personal Safety Awareness Training
8. Crumley Employment History Record

BACKGROUND

Grievant Keith Crumley was hired at ODOT on July 2, 2001, and promoted to Highway Technician 3 (lead worker), effective September 12, 2010. In accordance with his position description and as a lead worker, Grievant operates basic, standard and complex equipment, instructs crew members in proper highway maintenance procedures and safety practices, procures necessary equipment and materials and assigns equipment on a daily basis and carries out established policies and procedures, monitors work for quality and completeness, and so forth. In addition, Grievant performs a variety of general highway maintenance duties, which vary by season, but includes reshapes, digs, ditches, trenches, excavates and grades ditches, digs channel, and so forth. Grievant was the lead worker on a culvert replacement project on State Route 83 on October 9, 10, and 11, 2012.

Prior to the start of the culvert excavation job, Grievant and his supervisor visited the job site and had discussions about the project. Grievant expressed his concerns about his ability to serve as the lead worker. His supervisor informed him that he had a good crew working with him, and he could perform his job.

The culvert report for the project indicated that the site had a two foot diameter pipe with two feet of cover on top of the pipe. His supervisor subsequently marked width for a 10 foot wide trench which would result in a trench approximately 4 1/2 feet deep. In this situation no protective system is required.

Trenches 5 feet deep or greater require a protective system unless the excavation is made entirely in stable rock. If less than five feet deep a competent person may determine that a protective system is not required.

There are different types of protective systems, benching, sloping, shoring and shielding. Sloping involves cutting back the trench wall at an angle inclined away from the excavation. Benching is similar to sloping with steps cut into sides of the trench. All soils in Ohio are considered previously disturbed because of the glacier movement more than 10,000 years ago, and is classified as Type C-Soil. Type C- soil is unstable, previously disturbed soil that contains rock, sand and water possibilities. Benching cannot be done in Type C soil.¹ Shoring requires installing aluminum hydraulic or other types of supports to prevent soil movement and cave-ins. Shielding protects workers by using trench boxes or other types of supports to prevent soil cave-ins.

Witness Burnison was a member of the crew; Burnison operated the trac hoe. Burnison recommended to Grievant that he deviate from the previous marking of his supervisor, and allow Burnison to make the cuts by straddling the trench while digging out the dirt. Grievant agreed. The cut was made 5 feet wide resulting in a depth of over 6 feet which would require a trench box. Mike Keller, a videographer from the Office of Operations-Traffic Engineering was at the worksite on Day One to video the pavement cutting and trenching. After observing the excavation, Mr. Keller questioned Grievant whether a trench box was being used. Other crew members agreed that a trench box was necessary. Grievant called TM Linderman to discuss power lines and the need for trench box. Unaware of the deviation from the original markings, TM Linderman denied the request for trench box based upon the culvert report. Later that morning, Grievant called his supervisor. According to Grievant he called to discuss the trench box and according to

¹. The course material for Course HT 102-Personal Safety Awareness 01/2010 Section A(1)(d) should be modified to reflect that benching is not permitted on Type C-soil. It is also noted in Administrative Investigation #12-175 and the statement of Witness TA Mayes discusses benching as practice in this District.

his supervisor, they discussed power lines and waste removal. Grievant was told to haul waste to the Burbank yard, and Grievant had the waste hauled to the Point yard which is in another county.

Grievant completed the job without a trench box and without incident.

Employer issued a written reprimand to Grievant on 11/02/12 dated November 1, 2012 which stated that on October 10, 2012, Grievant was in violation of WR 101, Item #2B-Disobedience/refusal of an order or assignment by a superior. Specifically, Grievant did not follow orders to dump material at the location given. Grievant became upset regarding the issuance of the reprimand, and then reported to the Office of Investigative Services (OIS) that his supervisor forced Grievant to work on RT 83 culvert project in unsafe manner. Grievant alleged that his supervisor was at the worksite on Day one of the project and should have known the depth of the trench, and that a protective system was necessary.

The initial investigation was completed in January 2013 with the following findings: The allegations that TM Nyhart was neglectful in his duties by not foreseeing the depth of this excavation and taking appropriate safety measures is founded. The allegation that HT-3 Crumley was neglectful in his duties by not taking appropriate safety measures is founded. Subsequently, District Three Labor Relations Officer contacted OIS expressing concerns about the findings on TM Nyhart's actions. Of particular concern to OIS was the fact that TM Linderman was never interviewed, and his supporting documents were not reviewed during this investigation, and photos taken of the pavement showed the faded paint marks made by Nyhart indicating to the crew to cut the trench 10 feet wide, and the crew failed to make the cut. A supplemental investigation was commenced. District Three Labor Relations established a detailed time frame by minutes of the daily activity for the crew and supervisors from the start of the work day through the close of business which established that TM Nyhart was not

at the worksite on Day One. The timeline was established through cell phone records, emails, office phones, mileage reports and witness statements. The supplemental investigation found that Grievant was neglectful in his duties by not taking appropriate safety measures at a job site on October 9, 2012, and found that his supervisor was not neglectful in his duties dealing with the culvert replacement project in October 2012.

On April 5, 2013 Employer served a letter of removal upon Grievant. The removal was based upon the following work rule violations of Directive WR-101: 2(C) - Failure to follow policies of the Director, District or offices, 3(C) -Making defamatory or false statements, and 26 - Other actions that could harm or potentially harm the employees, a fellow employee or a member or members of the general public. Union filed its grievance on April 16, 2013 alleging a violation of Article 24 of the collective bargaining agreement and any/all other rules, articles, code, orders, and policy. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITION OF EMPLOYER

Employer contends that it was justified in removing Grievant for violation of WR-101: 2(C) - Failure to follow policies of the Director, District or offices, 3(C)-Making defamatory or false statements, and 26 - Other actions that could harm or potentially harm the employees, a fellow employee or a member or members of the general public. On October 9, 10 and 11, 2012 Grievant was the lead worker on the State Route 83 culvert replacement project. Grievant disregarded his supervisor's instructions regarding excavation and placed his co-workers in an unsafe situation. The investigation into the State Route 83 culvert replacement project was a direct result of Grievant's retaliation against his supervisor, and that Grievant made false statements and accusation against his supervisor. Said conduct violates WR-101, and Employer had just cause to discipline.

Employer contends that Grievant had proper training and experience to be the lead worker on the State Route 83 culvert replacement project. His training and work history qualified him as a Highway Technician 3 and as a competent person under OSHA regulations. Grievant was certified in both earthwork and drainage, and trenching was covered in said curriculum. Grievant had worked over 59 different culvert jobs, 44 of which involved trenching. On at least one of these jobs, grievant was the lead worker for a culvert replacement which involved excavation.

Employer contends that the actions of Grievant were retaliatory. Grievant announced to many persons that he was reporting his supervisor because he received a written reprimand for the waste removal. Grievant caused an investigation into the State Route 83 culvert replacement project based upon false statements regarding actions of his supervisor resulting in an initial finding that his supervisor was neglectful in his duties and should be removed.

Employer contends that written reprimand for the waste removal was issued with just cause. His supervisor directed Grievant to transport the waste to the Pointe; Grievant disregarded said directive and had the waste transported to Burbank which is in another county. The waste had to be removed the next day due to an EPA inspection in said county. The discipline was commensurate with the offense.

Employer requests that Grievance No. #31-03(04-19-13)16-01-07 be denied in its entirety.

POSITION OF UNION

Union contends that the discipline imposed on Grievant was excessive given the decisions made by other state employees to deviate from the markings and that the trench was safe without a trench box on the State Route 83 culvert replacement project on October 9, 10 and 11, 2012. No person was injured. Every member of the crew had the authority to stop the project if safety risks existed, and no one did. The penalty was not commensurate with the offense.

Union contends that Employer imposed a written reprimand on Grievant for the disposal of dirt and other spoils removed from the State Route 83 culvert replacement project and used that discipline to support their claim of progressive discipline in support of the removal. Section 25.01 (H) of the collective bargaining agreement permits the arbitrators to review the facts of a written reprimand if that written reprimand becomes a factor in the first subsequent disciplinary grievance which goes to arbitration. The underlying facts which resulted in the reprimand of November 1, 2012 did not warrant any discipline. Further, the written reprimand was part of the events of the investigation into the culvert replacement project.

Union contends that the administrative investigation resulting in the discipline of Grievant was unfair. The first investigation resulted in findings that both Grievant and his supervisor were neglectful in their duties by not taking appropriate measures for their work crew on the State Route 83 culvert replacement project with a recommendation of removal. The second investigation later identified Grievant as neglectful and exonerated the supervisor. The supervisor had motivation to divert blame to Grievant for an event that was caused by his negligence. Union further argues that the members of the crew were threatened by their supervisors regarding their account of the facts during the investigation by the State. The actions by their supervisors had a chilling effect on the free flow of information resulting in the investigation being prejudicial against the Grievant.

Union contends that Grievant was not properly trained on trench operations. The grievant had gone through training in 2004 which was not thorough. Grievant did not participate in subsequent training on trench operations offered by the Employer.

Union requests that Grievance No. #31-03(04-19-13)16-01-07 be sustained, and Grievant be reinstated to his position and assignments. Union requests that Grievant be made whole, with neither loss of seniority, nor loss of pay, minus deductions, including Union dues and Benefits Trust contributions. Further, the Union requests that all benefits provided under the collective bargaining agreement and Ohio State laws be restored, including, but not limited to sick, vacation and personal leave accruals. The Union also requests that upon his return to employment that his health care coverage be reinstated from date of termination with all health care/treatment expenses reimbursed, and a state match to any PERS contributions according to the split provided by the collective bargaining agreement with appropriate back pay, benefits and accruals.

DISCUSSION:

Union has renewed its objections regarding the admissibility of certain evidence. Evidence consists of the testimony of witnesses, any documents or other tangible items that were received into evidence as exhibits, and any facts on which the advocates have agreed or which the trier-of-fact takes notice as proved. Union argues that the parties had agreed at the Stipulations meetings that they would remove the reference of the Last Chance Agreement (LCA) from the stipulations but the Employer introduced the LCA as an Employer's Exhibit at the arbitration hearing.

Advocates can stipulate to an agreed statement of facts on which to submit their case to the trier-of-fact. A stipulation of fact means that a fact is no longer at issue, and must be accepted by the trier-of-fact. A stipulated fact is treated as undisputed and proved. If advocates cannot agree on a stipulation, the fact is disputed and the trier-of-fact must determine its admissibility. At the time of incident giving rise to the grievance, Grievant had on his employment record a LCA. The LCA was executed on August 26, 2008 for a period of five years through August 26, 2013, and defines a violation as noncompliance with any Departmental rule or policy for similar conduct in question. The LCA was properly admitted for the limited purpose of establishing the employment record of Grievant at the time of the incident. Employer and Union acknowledged that the LCA was not applicable to the charges herein, and was not considered in the decision of Employer for progressive discipline. There is the argument that otherwise relevant evidence should not be admitted if it is highly prejudicial. However, there is no jury, and to even make the admissibility argument to the Arbitrator, there is a disclosure of the LCA.

Union further contends that it was error to introduce into the record a LCA that was five years old. The collective bargaining agreement states that

discipline shall have no effect after two years. The LCA modifies the two-year retention provision, and is a separate contractual agreement of the Employer and Employee. The LCA is an agreement that the employer and employee voluntarily entered into and that is supported by valuable consideration, the employee's continued employment. The LCA states the specific terms by which the employee must abide by to maintain his employment. Failure to comply with the provisions of the LCA is a breach of the agreement or contract. An arbitrator's role is generally to determine whether an employee violated the agreement. The LCA is not at issue in this grievance. Again, the LCA was properly admitted for the limited purpose of establishing the employment record of Grievant at the time of the incident, and it was not used for progressive discipline.

Union contends that any evidence and testimony regarding the interpretation of the Verizon billing documents must be excluded by the Arbitrator. The Union argues that the Labor Relations Officer for District 3 was not qualified to testify regarding cell phone transmission and the location of cell phone towers to infer geographic location of an individual from a billing statement. Several cell phone bills were used during the course of the administrative investigation and referenced and/or admitted at the arbitration hearing. The evidence is polarized in this case. Union and its witnesses state that the supervisor was on-site the first day of the project and Employer and its witnesses state that he was not. Documentary evidence becomes more relevant; the cell phone bills establish that the supervisor was not at the State Route 83 culvert project worksite but instead viewing other job sites in different cities. The Labor Relations Officer testified that she relied on said evidence in making her decision about disciplinary measures.

Lay opinion testimony is permissible. A trier-of-fact may permit a person who is not testifying as an expert to testify in the form of an opinion

if the opinion is both rationally based on his perception and helps to explain the witness testimony. Cell phones are almost universal; most people have one and receive a monthly statement. These are common statements like utility bills, and the average person understands the information. The cell phone records of Grievant and his supervisor were a part of the administrative investigation. The cell phone billing statements set forth a column marked origination and a column marked destination. Typically, the origin/destination shows where the tower was located when the customer was using to make/receive the call. Technically, a person could be in one location but using a tower that may be listed as being somewhere else. It is undisputed that Grievant was at the location designated by the records. However, Union argues that the supervisor was not at the location he says he was, and is corroborated by his cell phone records. For evidentiary purposes, this would be a shift in the burden of persuasion to Union.

Union argues that all new evidence presented by the State at arbitration hearing should be excluded. Union cites Article 24.05 of the collective bargaining agreement to support its position. Article 24.05 states in pertinent part:

Prior to the (pre-disciplinary) 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 the time and documents known of at the 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 be provided to the Union and the employee prior to the meeting.

Union does not specifically state what evidence it deems was improperly admitted, so it is difficult to address this assignment of alleged error. Briefly, Article 24.05 requires Employer to disclose all documents known of and used

to support the contemplated discipline. If additional documents become available to support discipline prior to the pre-disciplinary meeting, Employer is obligated to disclose said documents. Article 24.05 does not address evidence/documents that become known in preparation of the arbitration case. The union argues that the pre-arbitral grievance steps should be applied to this evidence as well. Without knowing the specific document in question, this Arbitrator can only state it depends on the document, the facts to be proven, whether or not documents were requested and not provided, whether or not measures can be taken to alleviate any harm or prejudice, whether the information was discoverable by the opposing side, whether the information was known or should have been known by the opposing side, whether or not it is intentional "sandbagging". Exclusion is a harsh sanction, and it must be tempered by fundamental principles of fairness. Absent knowing the specific reference, this Arbitrator afforded a number of breaks and conferences to address a variety of issues which most likely included this one.

Article 25.01 (H) of the Collective Bargaining Agreement provides in pertinent part that "... If an oral or written reprimand becomes a factor in the first subsequent disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the oral or written reprimand. Grievant directed a crew member to haul waste from the State Route 83 culvert project to another county in disregard of a verbal directive of his supervisor to haul waste in the county of the work site, and received a written reprimand on November 2, 2012. Like much of the controversy in this case, this directive is disputed by Grievant. His supervisor received a call from other county's transportation administrator who was upset that the waste was brought to his county. Said county had an EPA inspection scheduled and was concerned about any impact of the waste at its yard. His supervisor then arranged for the waste to be hauled to another yard. A

witness on behalf of Grievant testified that he overheard the supervisor say that he was not sure where he told Grievant to haul the waste. His testimony was not convincing due to the lack of specificity in the details of the surrounding events. There was no credible evidence to support a finding of witness intimidation by the supervisor. The supervisor told the witness to tell truth in the administrative investigation or he may risk discipline.

The determination of remedy in an arbitration is simply not a substitution of judgment by an Arbitrator. An Arbitrator must judge whether the actions of the Employer are reasonable under the terms of the collective bargaining agreement between the parties. The fact that an arbitrator might have taken a different course of action than that taken by the Employer does not lead to the conclusion that the Employer's actions were unreasonable. An oral or written reprimand is appropriate with these facts.

Interesting enough the issuance of the written reprimand for the waste removal was the catalyst for the investigation of the State Route 83 culvert replacement project. Due to the receipt of the written reprimand, Grievant contacted OIS and reported that his supervisor failed to provide him a trench box for the State Route 83 culvert project which was finished approximately three weeks earlier. The failure to use a protective system for this project as it unfolded was a serious safety risk. Trenching collapses can occur without warning, regardless of the depth and how safe the soil appears. Workers can be seriously injured or killed if the sides of a trench or other excavation collapses. An investigation was initiated.

Grievant's termination is partially based on the Employer's conclusion that Grievant failed to perform his assigned duties. It is not disputed that based upon the original markings of the supervisor on the roadway, no protective system was required, and Grievant as the lead worker failed to comply with the original excavation plan on the State Route 83 culvert replacement project. However, the just cause standard requires more than

a violation of the work rule. Training and other mitigating factors are also considered in making a decision to terminate an employee.

Union vehemently argues that Grievant was not properly trained to act as the lead worker for the State Route 83 culvert replacement project, and he was not a competent person under OSHA regulation to inspect the excavation. Grievant had expressed to his supervisor his concerns that he was not confident that he could do the job prior to the first day of the project, and was told by his supervisor that he had a good crew working with him. The Employer had offered a specific course, "Behind the Barrel" on October 2, 2012. Grievant did not attend that training because he was scheduled on vacation.

Grievant has successfully completed coursework on Earthwork, Advanced Earthwork and Drainage, and holds certification for Drainage, Earthwork, General Knowledge, Pavement and Traffic Control Devices. These courses cover trenching. As for work experience, Employer introduced a GQL report which lists all jobs Grievant has worked on with culverts. The report indicates that Grievant worked on 59 jobs of which 44 involved trenching. Additional documents and testimony indicate that Grievant was the leader worker for an earlier culvert replacement job involving excavation and sloping.

ODOT policies have incorporated OSHA regulations. OSHA mandates that a competent person inspect the worksite. A competent person is someone who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. OSHA does not have any certification process for competency; there are no requisite hours or requisite coursework. Successful completion of all highway technician 2 level courses established by ODOT with the twelve month actual construction inspection

experience, all of which Grievant possessed, would deem a person competent under OSHA regulations. Grievant on paper is a competent person.

Just cause considers other mitigating factors such as tenure, prior discipline, and other mitigating factors. Grievant had almost twelve years with the Employer prior to his removal. Grievant had two written reprimands on his record. The written reprimand for removal of the waste from the State Route 83 Culvert replacement project on November 1, 2012 has been previously discussed. Employer issued a second written reprimand to Grievant on 1/10/13 which stated that on December 27, 2012, Grievant was in violation of WR 101, Item #8 Carelessness with vehicle resulting in loss, damage or unsafe act. Specifically, Grievant damaged the gate at the new facility while plowing the driveway and parking lot. The written reprimand of 1/10/13 occurred after the completion of the State Route 83 culvert replacement project. The safety violation at issue is severe. Although this crew was fortunate that nothing happened, cave-ins pose the greatest risk and are much more likely than other excavation-related accidents to result in worker fatalities. In considering the evidence presented on what happened on day one of the project, it is apparent that Grievant did not have the confidence in his training, knowledge and work experience to serve as lead worker for this project. His crew, and even the videographer recognized that a trench box was necessary when he did not. Although there is conflicting evidence concerning the discussions of his supervisors and Grievant, according to policy once Grievant determined that a trench box was necessary, Grievant had two alternatives, stop the project or go up the chain of command to secure the trench box. Grievant chose to do neither but instead, allow his crew to work in an unsafe environment.

WR-101 states in pertinent part ODOT is dedicated to the policy of progressive constructive discipline. Disciplinary actions should be imposed

at the lowest level possible with the intent of giving the employee the opportunity to correct his/her behavior so long as the discipline is commensurate with the infraction. Based upon the foregoing, removal is excessive and a heavy suspension due to the safety concerns would be commensurate with the infraction of failure to follow policies.

Grievant was terminated for additional misconduct beyond the failure to comply with his supervisor's directive and policies. Grievant was charged with making false statements about his supervisor in a retaliatory manner, and placing his crew in an unsafe situation and disregarded safety procedures.

As previously stated, Grievant could have stopped the project or run the chain of command, he chose not to do either and placed his crew in an unprotected trench. Further, he had no intention of reporting the incident until he was reprimanded for the waste removal, and he was going to get even with his supervisor. Assuming arguendo, that all the facts as alleged by Grievant is true, what does it say about Grievant as an employee of this Agency. Grievant is willing to place his crew at risk and avoid compliance with policy and regulation, and place allegations of wrongdoing by a coworker in his arsenal to use for future reference.

This is not the first time that Grievant acted in such a manner. Employer had previously initiated an administrative investigation of Grievant's supervisor for misuse of state property; there were allegations that the supervisor was using his state vehicle for personal use. Grievant furnished pictures of the supervisor's vehicle in front of his wife's place of employment for the investigation. The investigative findings indicated that his supervisor left work-related items at home and asked his wife to bring them to work with her since the place of her employment was closer. The

supervisor and Grievant traveled in the state vehicle to retrieve the items; Grievant took pictures just in case he needed them for future reference.

Grievant intentionally made false statements. Grievant alleged that his supervisor was at the worksite on the first day of the project, and saw the depth of the trench. The credible evidence does not support these allegations. Although Grievant was denied a trench box, it was denied because of nondisclosure of what was going on at the work site. These allegations led to the investigation into the actions of his supervisor which resulted in an initial recommendation of removal for the supervisor. And after paying attention to the details in email correspondence, telephone communications, mileage reports, and so forth the documentary evidence in conjunction with witness statements exonerated the supervisor. The Employer had cause to discipline Grievant for making false statements and other actions that could harm or potentially harm the employees, a fellow employee or a member or members of the general public.

Under WR101 for violation of 2C. Failure to follow policies of the Director, Districts or offices the progression is for a first offense Reprimand/Suspension; second offense is suspension and third offense is removal. For violation 3D Making defamatory or false statements the progression is for a first offense Reprimand/Suspension; second offense is suspension/removal and third offense is removal. For violation of 26 Other actions that could harm or potentially harm the employee, a fellow employee or a member or member of general public, the appropriate discipline depends on the severity of the incident. Based upon the actions of Grievant, Employer terminated Grievant.

The question, then, is whether the nature of the offense, his employment history and future employment relations with his employer warrant termination. The actions and behaviors of Grievant have severely

impaired the employer-employee relationship, have negatively the interactions of his coworkers and the operations of the Agency. The penalty is commensurate with the offense. Based upon the foregoing, the Arbitrator finds that Employer had just cause for removal.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance No. #31-13-(04-19-13)16-01-07 is denied. Employer had just cause to discipline for failure to follow policy. Employer had just cause to remove Grievant for making false statements and other actions that could harm or potentially harm the employees, a fellow employee or a member or members of the general public.

March 27, 2014

Meeta Bass Lyons
Arbitrator Meeta Bass Lyons
Steubenville, Ohio