

Susan Grody Ruben, Esq.
Labor Arbitrator
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**ARBITRATION PROCEEDING PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE
PARTIES**

In the Matter of	◆	
	◆	
FRATERNAL ORDER OF POLICE,	◆	
OHIO LABOR COUNCIL, INC.	◆	
	◆	ARBITRATOR'S
and	◆	OPINION
	◆	and AWARD
OHIO DEPARTMENT OF	◆	
TAXATION	◆	
	◆	
Grievant: James Goodall	◆	
Case No. 30-03-20140416-0014-05-02	◆	

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC. ("the Union") and the STATE OF OHIO ("the State" or "the Department") 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 October 1, 2014. Both Parties were represented by advocates who had full opportunity to examine and cross-examine witnesses and introduce documentary evidence. Both Parties filed timely post-hearing briefs.

APPEARANCES:

On behalf of the Union:

PAUL L. COX, Esq., Chief Counsel, Fraternal Order of Police, Ohio Labor Council, Inc..

On behalf of the State:

CHARLES L. KUMPAR, Labor Relations Administrator 1, Ohio Department of Taxation.

ISSUE

**Did the State have just cause to demote the Grievant's employment?
If not, what is the appropriate remedy?**

RELEVANT PORTIONS OF THE AGREEMENT

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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 of 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 severe 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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FACTS

Effective December 30, 2012, class specifications for the Department's tax agents were updated. As a result of this updating process, the Grievant was moved from a Tax Criminal Investigation Agent to the position of Tax Criminal Investigation Senior Agent.

Effective April 7, 2014, the State demoted the Grievant from Tax Criminal Investigation Senior Agent back to Tax Criminal Investigation Agent. As stated in the State's April 2, 2014 charging letter, the reason for the demotion was:

...violation of Department Workrule #3a – Neglect of Duty – Engaging in an act compromising the operation of the State of Ohio or the Department. Specifically, as a Tax Criminal Investigations Senior Agent you are responsible to act as the Lead Evidence Technician for the Northeast district/region. On November 15, 2013 Agent Supervisor Farid and Senior Agent Costa conducted an audit of the Northeast evidence room to determine what items and/or cases could be transferred to the Central district/region (main) evidence room. During the course of the review of the Northeast evidence room it was determined that numerous items were not being kept per the expected standards mandated by divisional policy. Several issues were noted as not being in compliance with evidence room policy, including, but not limited to:

- 1. Leaving the evidence room unattended and unsecured while no agents were present in the area.**
- 2. Numerous items were not marked as destroyed when they had been destroyed 4 to 5 months earlier.**
- 3. Case numbered items were not properly stored and located as indicated on the Master Inventory.**
- 4. Improperly retaining evidence at your personal residence**
- 5. Incorrect notation of boxes versus envelopes**
- 6. Items on Master Inventory with no case number or case name.**
- 7. Not timely and appropriately logging evidence in the Department's Evidence Database system.**

The Union filed the instant grievance on April 16, 2014. It states in pertinent part:

[The demotion] is in violation of contract Article 19 Disciplinary Procedures, 19.01 that requires just cause and Article 19.05 that requires progressive discipline.

The reason provided for the action is violation of Departmental Workrule #3 – Neglect of Duty – Engaging in an Act compromising the operation of the State of Ohio or the Department.

Prior to the implementation of the discipline, the Grievant never received “counseling and/or any work discussions” referenc[ing] an action or behavior that might lead to discipline. The Grievant was never provided any notification of unsatisfactory performance, no performance improvement plan nor any Ad Hoc Reviews. Lastly, the Grievant was never provided any remedial training to correct any specific

deficiency.

POSITIONS OF THE PARTIES

State Position

The Department had just cause to demote the Grievant. His numerous acts of neglect of duty were serious enough to show the Grievant did not possess the capabilities to satisfactorily perform the Lead Evidence Officer duty of the Senior Tax Criminal Investigations Agent.

On November 15, 2013, Agent Supervisor Farid and Senior Agent Costa conducted an inspection of the Northeast region evidence room. At that time, the Grievant advised Agent Supervisor Farid that the Grievant's master evidence inventory was "about 75% complete." The Master Evidence inventory document is a primary evidence document. "About 75% complete" is never an acceptable statement for a Master Evidence inventory; this demonstrated neglect of duty.

Moreover, while Farid and Costa went to the parking lot, the Grievant left the evidence room open and unattended; this demonstrated further neglect of duty.

The Grievant violated fundamental Divisional and Departmental Work Rules and Policies. He incorrectly indicated items had been destroyed when they had not been; conversely, he incorrectly identified items as retained, when they had been destroyed months earlier.

A basic responsibility of the Criminal Investigations Division is to ensure evidence collected during an investigation is properly catalogued, secured, and maintained. When an investigative unit is unable to demonstrate a proper chain of custody, criminal prosecutions fail.

A demotion was commensurate with the Grievant's violations related to the proper documenting, processing, and maintaining evidence. The demotion was for just cause.

Union Position

The State failed to meet its burden of proving the Grievant violated Department rules. Also, the State failed to follow progressive discipline as required by Article 19 of the Parties' Agreement. Accordingly, the State failed to meet its burden of proving the demotion was for just cause.

The neglect of duty charge is based upon seven allegations:

- 1. *Leaving the evidence room unattended while no agents were present in the area.***

This allegation stems from the day on which Farid and Costa inspected the Northeast evidence locker. At one point, the Grievant was in the evidence locker while Farid and Costa went to get forms from their car. The Grievant then left the evidence locker, but he was able to view all entrances to the locker during the time he was outside the locker.

The State points out the locker is in a public storage facility. If the State feels this is not a secure environment, it needs to seek a better facility. If the locker was compromised during the period of time the Grievant was outside the locker, the State would have presented evidence to that effect.

- 2. *Numerous items were not marked as destroyed when they had been destroyed 4 to 5 months earlier.***

The Grievant has admitted some information had not been entered into the computer yet. However, all information had been properly entered into the evidence log.

- 3. *Case numbered items were not properly stored and located as indicated on the Master Inventory.***

The Grievant disputes this charge. He believes everything was in its proper place. The Grievant also said there were a large number of boxes in the locker for a year that had no case numbers, so he had to go through the marked numbers, and some did not have a

case number. The Grievant actually inherited this problem.

4. *Improperly retaining evidence at personal residence.*

The Grievant denies this charge. He never took evidence from the locker to his home. He has taken the jackets from cases to his home in order to enter the necessary information into the computer. These agents work out of their homes; it is not out of the ordinary to input information from the case jacket at home. Because there often was no wireless signal at the locker, he often couldn't input information there. The Grievant had nothing in his car trunk nor in his home that he was not permitted to have.

5. *Incorrect notation of boxes versus envelopes.*

The Grievant says he is able to tell the difference between an envelope and a box, but admits he may have made typos.

6. *Items on Master Inventory with no case number or name.*

All evidence had to be typed into the Master Inventory. The Grievant took case jackets home to input this information because the computer did not work at the site.

7. *Not timely and appropriately logging evidence in the Department's Evidence Database System.*

There is no timeline for this to occur.

The State's case is flawed in several respects. First, it never conducted an audit of the evidence locker prior to handing it over to the Grievant. The Grievant may have inherited many of the issues to which the State refers. Without an audit prior to handing the evidence locker over to the Grievant, how can the State prove any of the allegations?

Second, the State claims the Grievant received training prior to becoming the Lead Evidence Agent. Other than showing him how to input information in the new computer system in 2011, the only training the Grievant received occurred in 2005. The Grievant was not the Lead Evidence Agent in 2005; he was placed in that position in 2012. Perhaps a refresher course was in order. The Grievant had 75% of the information in the computer. Prior to his assuming this duty, no one knows how much of the information had been typed into the Master Evidence log.

In October 2013, the Grievant told his supervisors he was feeling overwhelmed; he requested help with the evidence locker. The Grievant's pleas for help were answered by an audit and his demotion.

The Union has never agreed to the State's unilaterally-implemented disciplinary grid. Article 19.05 requires the State to use progressive discipline: verbal reprimand, written reprimand, fines, suspension, leave

reduction, working suspension; all prior to demotion. The Agreement permits the State to apply more serious discipline only when an employee's actions constitute serious misconduct.

The State made no attempt to show the Grievant was guilty of serious misconduct. Moreover, the Grievant's only prior discipline is a verbal reprimand for an infraction unrelated to the recordkeeping charges in the instant matter. One verbal reprimand in 15.5 years of employment does not support a jump to severe discipline such as a demotion.

The State violated Article 18.02 when it conducted an investigation in January 2014 without properly notifying the Grievant of the charges against him. Article 18.02 states what is required in an internal investigation; none of the contractual requirements were met.

Nothing the Grievant did resulted in a compromise of the operations of the State of the Department. None of the evidence the Grievant handled was compromised. Because the demotion lacked just cause, the Arbitrator should sustain the grievance, order the State to return the Grievant to his former position, and make him whole, including any back pay and benefits that would be due.

OPINION

The State's April 2, 2014 charging letter is the basis for analyzing whether the State had just cause for demoting the Grievant. That letter charges the Grievant with being guilty of:

- 1. Leaving the evidence room unattended;**
- 2. Not marking destroyed items as destroyed;**
- 3. Not storing items according to their location listed in the Master Inventory;**
- 4. Taking evidence home;**
- 5. Incorrectly notating boxes as envelopes and vice versa;**
- 6. Items in Master Inventory with no case number or name; and**
- 7. Not timely logging evidence into the database.**

The Arbitrator will review the record evidence supporting and not supporting each of these charges.

1. Leaving the evidence room unattended

It is undisputed in the record that the Grievant left the evidence room open and unattended on November 15, 2013 when Agent Supervisor Farid and Senior Agent Costa went to their car to get some forms. The Grievant defends this conduct on the basis that even though

he left the evidence room open and unattended, from where he went, he could still see the doors to the evidence room.

As demonstrated in the record, and as is common sense, an evidence room cannot be left open and unattended for chain of custody reasons. The fact that the Grievant could see the doors to the evidence room from where he went is helpful, but ultimately, falls short of fulfilling his job duty to keep the evidence room secure, and is evidence of neglect of duty.

2. Not marking destroyed items as destroyed

The Grievant admitted the Master Inventory was not up to date. The record shows the Grievant was as much as five months behind in logging destroyed items in the Master Inventory. This is further evidence of the Grievant's neglect of duty.

3. Not storing items according to their location listed in the Master Inventory

The record shows the Grievant may have inherited this problem. The record also shows that although the Grievant had over a year to get to the bottom of this problem, he did not complete the task in that time.

This could be evidence of neglect of duty, though there is insufficient evidence in the record to determine that.

4. Taking evidence home

The record does not substantiate this charge. The record shows the Grievant took evidence jackets home for the purpose of entering them into the Department's computerized records. Given that the wireless signal at the evidence locker was weak, and that the Grievant was assigned to work from home, taking evidence jackets home is not evidence of improperly retaining evidence at his home.

5. Incorrectly notating boxes as envelopes and vice versa

There is record evidence of boxes and envelopes being incorrectly identified. The Grievant testified, "If I did it, it was a mistake. I have no answer for that." This is evidence of sloppy work, which is evidence of neglect of duty.

6. Items in Master Inventory with no case number or name

It was part of the Grievant's duties to have all items in the Master Inventory identified with case number and name. This work was incomplete, which is evidence of neglect of duty.

7. Not timely logging evidence into the database

The Grievant admitted the database he was responsible for was only “75% complete,” and that he told that to Agent Supervisor Farid and Senior Agent Costa when they conducted an audit of his facility on November 15, 2013. This is wholly unacceptable and strong evidence of neglect of duty.¹

Summary of Record Evidence of Charges

The record demonstrates the Grievant neglected his duty in several significant areas. However, the State has not proven all seven of the charges it brought against the Grievant.

Whether Demotion Was Appropriate Under All the Circumstances

The Union contends the Grievant may have had insufficient training for his position. The record shows the Grievant had OPOTA Evidence Room Management training in 2005. Though the Grievant’s classification

¹ Additionally, during the Administrative Investigation, the Grievant was asked:

According to General Order 84.1.1, evidence is to be entered into a written log and input into the evidence database system as soon as practical. As Evidence Officer, did you adhere to this directive and keep evidence logged and current?

The Grievant answered, “No.”

changed at the end of 2012, he testified that his duties did not significantly change. Accordingly, his 2005 training was still relevant to his 2013 duties. The Grievant also testified that the evidence room “procedures were explained adequately to me.”

The Union also contends the case is flawed because the State did not conduct an audit of the evidence locker before assigning it to the Grievant. While the lack of an audit before the Grievant became responsible for the evidence locker is borne out by the record, by the time of the November 2013 audit that led to the Grievant’s demotion, the Grievant had been responsible for the locker for a substantial period of time. Accordingly, it was reasonable for the State to hold the Grievant responsible for the state of the evidence locker in November 2013.

The Union’s strongest argument is that the State did not engage in progressive discipline when it demoted the Grievant. Article 19.05, however, provides that “more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.” The Union contends the State did not attempt to show the Grievant engaged in “serious” misconduct. The Arbitrator disagrees. There is adequate record evidence that the Grievant’s responsibility for the orderliness and

security of the evidence locker was directly related to chain of custody issues. Accordingly, by any interpretation, the Grievant's neglect of duty with regard to the orderliness and security of the evidence was "serious." That the State did not identify any particular case that was compromised by the Grievant's neglect of duty does not excuse the Grievant's neglect of duty.

The record demonstrates the Grievant was not performing his job duties adequately. Under the Grievant's watch, the evidence locker was in a state of serious disarray. The State's decision to demote the Grievant was reasonable under the circumstances.

AWARD

For the reasons stated above, the grievance is denied. The State had just cause to demote the Grievant.

December 10, 2014

Susan Grody Ruben
Arbitrator