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IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

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MAY 17 2010

OCSEA-OFFICE OF
GENERAL COUNSEL

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME Local 11
AFL-CIO

and

OHIO DEPARTMENT OF
DEVELOPMENTAL DISABILITIES

Case No. 24-06-2009-0902-0030-01-04
Grievant: Kimberly Winkfield

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator, whose decision shall be final and binding pursuant to the Agreement.

Hearing was held March 4, 2010 in Columbus, Ohio. The Union advocate and the State advocate were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument.

APPEARANCES:

On behalf of the Union:

**BARBARA FOLLMAN, Staff Representative, OCSEA,
Columbus, Ohio.**

On behalf of the State:

**ANTOINETTE WALLACE, Labor Relations Officer, Ohio
Department of Developmental Disabilities, Columbus,
Ohio.**

STIPULATED ISSUE

Did the Grievant cause loss or damage to property through a negligent act, which resulted in the removal from her position as a Therapeutic Program Worker? If not, what shall the remedy be?

RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

Article 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....

...

Article 24.06 – Imposition of Discipline

...

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

STIPULATED FACTS

- 1. The Grievance is properly before the Arbitrator.**
- 2. The Grievant began her employment as a permanent Therapeutic Program Worker on 11/03/03.**
- 3. The Grievant was removed on 09/01/09.**

4. The Grievant had the following discipline on file at the time of her removal:

Performance Track

October 2007 2-Day Penalty in Fine (Creating a Disturbance)

March 2009 5-Day Penalty in Fine (Inconsiderate Treatment)

Attendance Track

October 2007 2-Day Penalty in Fine (AWOL no call, no show)

5. The Grievant was removed for violation of the following work rules of DODD's Disciplinary Grid: Loss or Damage to Property through Negligent Act of the Employee.

ADDITIONAL FACTS

On July 9, 2009 at approximately 2pm, the Grievant, as part of her regular duties as a Therapeutic Program Worker, was transporting residents from one building to another in a State van on the grounds of the Columbus Developmental Center ("CDC"). While driving, she hit a co-worker's car in the CDC parking lot. The accident significantly damaged both the State van and the co-worker's car.

In her written statement regarding the accident to the CDC Police, the Grievant wrote in pertinent part:

I...was loading the Van. Leaving the Rec Center. We were all having a good time enjoying oursel[ves]. I was going to get the guys that live in 1720 Building. And take them back home. When I got into the Van, and started driving up the hill I notice[d] I was hot and as I started to drive I ended up on gravel and I hit somebody's car. Margaret came to the van and told me to stop put the car in park and get out. I was shaken up and dizzy. My right leg felt numb. And she walked with me to the Rec Center. Police called. EMS took vitals. Supervisor...gave me some water and put fan on me.

The CDC Police Report of the incident provides in pertinent part:

...

After receiving the report of the traffic crash, gathering photos, and reviewing evidence that was left behind from the

vehicle, it appears that [the Grievant] turned wide left out of the parking lot, into the gravel and grass against the posted One Way sign. Once she started back around she lost control, striking the curb of the island in the lot, the entrance sign, and ultimately striking [a co-wirjer's car] causing severe damage to it. ...[The Grievant] reported that she was turning the van around to pick up individuals at the front door of the Rec. Center. It is believed that instead of going all the way around Administrative Circle back to the proper entry point for the lot, she attempted to utilize a short cut be entering the wrong way.

The CDC Police cited the Grievant for Failure to Control (ORC 4511.202) and Operate wrong way on one way (ORC 4511.32).

The Grievant was notified she was to be disciplined for causing Damage to Property through Negligent Act. A Pre-Disciplinary Meeting was held August 19, 2009. In the Pre-Disciplinary Meeting Report, the Hearing Officer wrote in pertinent part:

There is no dispute over the fact that [the Grievant] was the responsible party for wrecking the state vehicle. ...In doing so, she went the wrong way on a one-way street, drove the vehicle off the road and onto the grass/gravel to make a U-turn and ran over a parking sign. This act resulted in a CDC employee's personal vehicle being totaled as well as damages to the State Vehicle.

[The Grievant] made reference to the vehicle having steering problems. ...[There have been no] complaints about the vehicle operating properly to include its steering....

[Prior Discipline]

...[J]ust cause does exist to impose the appropriate level of discipline for the charge(s) of Loss or Damage to Property through Negligent Act of the Employee.

...

The Appointing Authority recommends Removal.

In the Notice of Removal dated August 20, 2009, the Grievant was informed she was being removed effective September 1, 2009 for Loss or Damage to Property through Negligent Act of the Employee. The Notice provides in pertinent part:

On July 9, 2009 shortly before 2:00 p.m. you were working as a TPW in the Day Hab program. Your duties called for you to drive a

vehicle...around to the front entrance of the Rec Center to allow individuals to get on the van and be transported to their homes. However, upon doing so, you turned wide to the left out of the parking lot against the posted One-Way sign. You drove onto the grass/gravel to make a U-turn. Once you started back around, you lost control of the vehicle striking the curb of the island in the parking lot. You ran the van over the entrance sign and ultimately struck a coworker's vehicle causing severe damage to it.

The Union filed a grievance dated September 2, 2009. It provides in pertinent part:

[The Grievant] was no[t] negligent in her actions. She was blacked out during the episode. She was not aware of her surroundings. The Center should be more lenient with her.

The worker should [be] made whole.

PARTIES' POSITIONS

State's Position

The Grievant progressed through the disciplinary grid and was charged with loss or damage to property through a negligent act which led to her removal. Instead of the Grievant following the traffic sign on a one-way street which would have required her to turn right and loop all the way around the circle, she chose to commit a negligent act when she went the wrong way on a one-way street. The investigating police officer, who had been trained to assess accident scenes, determined the Grievant went the wrong way on the circle by examining the van's yaw marks on the road and analyzing the placement of the van when it came to a stop.

The Grievant gave several excuses explaining her actions throughout the investigation, pre-disciplinary meeting, and Step 3 hearing. On the day of the incident she stated she notice she was "hot" as she started to drive. During the pre-disciplinary hearing, she stated she was hot because she had been dancing and doing karaoke with the residents. It was very warm in the van as well. She turned on the air conditioner, but it did not cool the van immediately. While

driving the van, she became disoriented and was not sure what occurred. During the Step 3 grievance hearing, she stated she had blacked out during the episode and was not aware of her surroundings. She also stated at the Step 3 that she has multiple sclerosis and that her actions were caused by the MS. When asked when her last MS event occurred, she stated over five years ago. When asked if she has had an MS event since the instant incident, she stated she had not. Though she saw her regular doctor the day after the incident (due to a previously-scheduled appointment), it is curious she waited one month – also a previously-scheduled appointment – to see her MS doctor. The Grievant is not credible because her story changed three times. When one story did not work, she changed it hoping for success with a different story.

The CDC was very fortunate there were no residents in the van at the time of the accident. If there had been, the work rule violation would have been more severe. The discipline was commensurate with the offense. Regardless of the work rule committed, the Grievant would have been removed by progression.

Union's Position

The State has not met its burden of proof regarding negligence on the Grievant's part. The State advances a theory the Grievant was taking a shortcut and went the wrong way on a one-way circle. The State has absolutely no proof of that theory – not witnesses, no videotape, no evidence whatsoever.

Negligence is defined as knowingly conducting an act with willful, wanton, or reckless disregard of the consequences. The incident in question does not meet any of these standards. In fact, the accident was due to a medical condition over which the Grievant had no control.

Some years ago, the Grievant was diagnosed with MS. She has been under a treatment plan, and has had very few relapses. It did not occur to her

immediately after the accident the MS caused her loss of control of the van. Individuals with MS can be very heat-intolerant, and can have episodes of pseudoexacerbation, i.e., the MS triggers symptoms, sometimes severe, but not relapses, as there are no lasting effects. The Grievant experienced a blackout very likely caused by being overheated, which she reported at the scene.

In Case No. 6-86-D3-U6, the arbitrator held the State did not meet its burden of proving negligence in a case involving a grievant who had damaged a snow plow while plowing snow. That arbitrator rescinded the 30-day suspension and made that grievant whole.

The court that presided over the Grievant's traffic ticket held her MS was an extenuating circumstance that mitigated her sentence. Likewise, the State should acknowledge the extenuating circumstances surrounding the accident and rescind the inappropriate charge of negligence. The Grievant should be returned to her TPW position at CDC, and granted back pay and benefits to make her whole.

OPINION

The State has the burden of proving just cause for the Grievant's removal. Basically, just cause consists of two essential elements: 1) Did the Grievant conduct herself as charged; and 2) Is the discipline appropriate under all the circumstances.

Whether the Grievant Committed a Negligent Act that Caused Damage to Property

It is undisputed the Grievant was driving the van at the time of the accident. What is undisputed is: 1) whether the Grievant's medical condition caused her to lose control of the van; and 2) whether the Grievant took a shortcut that involved going the wrong way on a one-way circle.

Whether the Grievant's Medical Condition Caused the Accident

The Union contends the Grievant's MS caused her to have a blackout on a hot day while driving the van. The Union urges the Arbitrator to consider this an extenuating circumstance negating any just cause for discipline. Essentially, the Union presents the Grievant's medical condition as an affirmative defense to the State's negligence charge.

Record evidence includes literature regarding MS. Symptoms are said to include dizziness, though blackouts are not mentioned. The record also includes the following facts: the Grievant did not seek medical care beyond the EMS having checked her vitals (which were normal); the Grievant drove herself home that day; she saw her regular doctor the next day (she had a previously-scheduled appointment); and she saw her MS doctor a month later, also a previously-scheduled appointment. This lack of urgency on the Grievant's part cuts against the Grievant's explanation the MS caused the accident.

The investigating police officer testified the Ohio Revised Code holds a driver responsible despite any medical condition. Moreover, at the time of the accident, the Grievant had an unrestricted Ohio driver's license. The Grievant testified she had no MS incidents for five years before the July 2009 van accident, and none since the accident. These factors also make it less likely the Grievant's MS caused the accident and/or it should be considered a mitigating circumstance against just cause.

Whether the Grievant took a Prohibited Shortcut

There were no eyewitnesses to the accident. The Grievant testified she did not take the shortcut of going the wrong way on the one-way circle. The investigating police officer, however, concluded the Grievant had gone the wrong way on the circle. His conclusion was based on examining the van's yaw marks on the pavement, as well as the placement of the van when it came to a stop on

the grass. The officer had vehicle accident investigation training from both the Police Academy and the Ohio Highway Patrol.

Other than the Grievant's denial of taking the shortcut, there is no record evidence contradicting the officer's conclusion that the Grievant did indeed go the wrong way on the one-way circle. From the photographic evidence of the yaw marks, the officer's training, and his straightforward testimony, the Arbitrator credits the officer's conclusion.

Conclusion Regarding the Work Rule Violation

The Arbitrator does not agree with the Union's definition of negligence as willful, wanton conduct. It is well-accepted willful and wanton conduct are hallmarks of *gross* negligence, or even intentional misconduct. In contrast, the State charged the Grievant with negligent conduct that caused damage to State property. Negligence is the failure to exercise reasonable care in a given situation.

The Arbitrator cannot say with assurance the Grievant was negligent with regard to any causation between her MS and the accident. The unpredictable and episodic nature of MS, as set out in the record, lends uncertainty to any conclusion on this subject.

The Arbitrator can say with assurance, however, based on the solid testimony of the investigating officer and related documentary evidence, that the State has carried its burden of proof that the Grievant took the shortcut on the circle, going the wrong way on the one-way circle. Such poor judgment on the Grievant's part is a textbook example of negligence. The Grievant failed to exercise reasonable care when she took the prohibited shortcut. There being no dispute the Grievant caused property damage to the van, the State has carried its burden of proof that the Grievant committed a negligent act that caused damage to State property.

The Union's reliance on Case No. 6-86-D3-U6 is misplaced. There, the arbitrator found the record showed the physical evidence was not consistent with the negligence charged by the State.¹ Here, the physical evidence in the record supports the State's charge of the Grievant negligently operating the vehicle.

Whether Removal is Appropriate Under All the Circumstances

It is undisputed the Grievant's prior disciplinary history includes a 2-day suspension and a 5-day suspension for performance shortcomings. Removal would be the appropriate next step unless there are extenuating circumstances.

Whether or not the Grievant's MS affected her operation of the van, there are no extenuating circumstances regarding the Grievant's decision to take the prohibited shortcut. Accordingly, the State had just cause to remove the Grievant from her position.

AWARD

For the reasons set out above, the grievance is denied.

Dated: May 12, 2010

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator

¹ "... The fact that the plow and frame [of the snowplow] slid forward and came off while the vehicle was moving suggests that this plow had been raised to some degree, and this lends credence to the grievant's account of what transpired.... The bottom edge of the plow was not damaged, as might have been the case if the accident occurred as Management alleged.... The notice of charges indicates that 'extensive' damage was done to the vehicle, however, this was clearly refuted by the evidence."