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ARBITRATION PROCEEDING PURSUANT TO COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of	◆	
	◆	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION	◆	
	◆	ARBITRATOR'S
and	◆	OPINION
	◆	and AWARD
OHIO BUREAU OF WORKERS' COMPENSATION	◆	
	◆	
Grievant: Scott Bunting	◆	
Case No. 34-11-130422-0020-01-07	◆	

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State" or "BWC") 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 January 9, 2014. Both Parties were represented by advocates who had full opportunity to examine and cross-examine witnesses and introduce documentary evidence. Both Parties filed post-hearing briefs on or before February 17, 2014.

APPEARANCES:

On behalf of the Union:

MICHAEL P. SCHEFFER, Staff Representative, OCSEA, Columbus, Ohio.

On behalf of the State:

BRADLEY A. NIELSEN, BWC Labor Relations Officer 3, Ohio Bureau of Workers' Compensation, Columbus, Ohio.

ISSUE

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

RELEVANT PORTIONS OF THE AGREEMENT

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ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees....

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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 working 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.

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FACTS

The Grievant was employed by the State as a Fraud Investigator for the Bureau of Workers' Compensation. He was removed for performance issues effective April 17, 2013. His removal letter provides in pertinent part:

> The Ohio Bureau of Workers' Compensation (BWC) is hereby removing you from employment effective April 17, 2013.
>
> The BWC determined there is just cause for discipline based upon your following violations of the BWC Disciplinary Policy: Insubordination (b) Failure to follow supervisor direction and/or failure to follow a written policy of the employer; & Neglect of Duty: (a) General; (b) Carelessness with agency information, property (e.g. mail, warrants, claims files, Law Enforcement Automated Data System-LEADS) and/or agency equipment.
>
> > Specifically, you failed to conduct an investigation in a professional manner and failed to comply with the policies and expectations of the BWC Special

Investigations Department (SID). In your investigation of suspect GF and his business TD, you made numerous investigatory errors summarized as follows:

1) **Failure to spell suspect GF's name correctly when completing a Memorandum of Interview (MOI);**

2) **Failure to run a OHLEG[1]/LEADS check by using GF's social security number (SSN) and/or date of birth (DOB);**

3) **Failure to spell suspect GF's name correctly when searching his name in OHLEG/LEADS;**

4) **After searching the incorrect spelling of GF's name in OHLEG/LEADS, failure to cross reference the search results with suspect GF's correct SSN and DOB contained in the investigative file;**

5) **Completing a Report of Investigation (ROI) with suspect GF's name spelled incorrectly, incorrect SSN & incorrect DOB;**

6) **Filing a felony complaint with Trumbull County Central Court against suspect GF for passing bad checks with an incorrect spelling of GF's name, incorrect SSN & incorrect DOB;**

7) **Failing to double check/cross reference suspect GF's name/SSN/DOB when filing the felony complaint to ensure accuracy; &**

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[1] Ohio Law Enforcement Gateway.

[2] *See, e.g.,* Discipline and Discharge in Arbitration, 2nd ed., BNA (2005) at p. 195:

8) Failure to enter notes into the Fraud Management System (FMS) documenting case activity.

The court issued a bench warrant for the arrest of suspect GF in 2013. When completing the bench warrant, the court obtained GF's incorrect name spelling, incorrect SSN and incorrect DOB from your ROI and placed that information on the warrant. Thus, the court issued a bench warrant for an innocent person with the name GF. The police department in Stark County viewed the warrant and arrested innocent GF and incarcerated him for three (3) days before correcting the error. But for the incorrect information in your ROI, innocent GF would not have been arrested and spent three (3) days incarcerated. Innocent GF now possesses a BCI and FBI criminal record as a result of the erroneous arrest. Further, your actions brought discredit to the BWC and the BWC is responsible for any damages/restitution to which innocent GF is entitled.

...

The Union filed the instant grievance, which has proceeded to arbitration.

POSITIONS OF THE PARTIES

State Position

The BWC had just cause to remove the Grievant. The errors he made leading to the wrongful arrest and incarceration of GF are not in

dispute. When the Grievant performed the OHLEG search, he entered the incorrect first name of "Gary," rather than the correct first name of "Garry." The Grievant had interviewed the correct Garry in person in October 2009 regarding a bad check Garry had submitted to pay his workers' compensation premium. The Grievant's entry of "Gary" in OHLEG retrieved information including a color picture from Gary's driver's license. The Grievant then identified Gary as the subject in the Memorandum of Interview and in the Report of Investigation. He then failed to cross-reference his MOI and ROI with the SSN and/or DOB contained in Garry's investigative file. The Grievant later signed the felony complaint against the wrong GF.

The Grievant was insubordinate because he failed to follow a written BWC policy, specifically the rule requiring Fraud Investigators to enter FMS notes within 48 hours after obtaining the information. The Grievant failed to enter at least two FMS notes. Additionally, he entered some incomplete and inaccurate FMS notes in this matter.

For all three charges against the Grievant, the BWC Disciplinary Policy prescribes the same level of discipline for a first-time violation – determination based upon severity of incident. BWC determined removal

is appropriate based upon the quantity and severity of the Grievant's errors, his failure to engage in any corrective action to catch the errors, and the outcome caused by the errors. As shown by his continuous errors, the Grievant has shown he cannot adequately perform the duties of Fraud Investigator. Removal is the necessary step to ensure another innocent person is not wrongfully arrested and incarcerated due to the Grievant's careless actions.

The Grievant is a seasoned investigator. There is no rational excuse for making the repeated errors in the GF investigation. Apologizing and showing some remorse during the arbitration does not transform the Grievant into a competent Fraud Investigator. It certainly does not limit the BWC's liability for future transgressions.

Logic dictates if a Fraud Investigator cannot spell a subject's name correctly and/or make use of accurate personal identifiers, that Fraud Investigator cannot perform the more complex components of the position. The Grievant admits he should have conducted the OHLEG search using either a SSN or DOB. He had access to both in the investigative file.

The Grievant did not make just one mistake. Rather, he made a continuous series of errors. After he conducted the erroneous OHLEG search, he did not cross-reference his search results with the correct information in his investigative file. Moreover, the Grievant did not look at the color photo his erroneous search turned up – a man with a full head of hair. The man the Grievant had interviewed in person is predominantly bald. The Grievant admits this error.

Even after the Grievant knew of the wrongful arrest and incarceration, he still failed to spell GF's name correctly in the case update requested by his supervisor. In fact, he used "Gary" and "Garry" interchangeably in that summary. This conduct is unforgiveable and indefensible, especially after the damage done to GF. It demonstrates an incompetent Fraud Investigator who has no regard for the outcome of his actions.

The Union's appeal to the Arbitrator for discipline mitigation is based solely upon the Grievant's years of service and on the fact he had no active disciplinary record at the time of his removal. The Union attempted to make a due process argument, but was unable to do so. Contrary to the Union's claims, management permitted the Grievant to

consider resigning. Management did not threaten the Grievant. In an email to the Union where the BWC stated "we were most likely removing Bunting from employment," the email also discussed the resignation option and encouraged the Union to speak to the Grievant. Merely informing the Grievant and Union of a proposed recommendation for discipline does not deny the Grievant any due process or violate the Agreement.

While the Grievant admits his errors led to a wrongful arrest, he and the Union contend supervisors who signed the ROI are equally to blame. As the Grievant's position description states, it was the Grievant's responsibility to prepare accurate investigative reports. SID Acting Director Jennifer Saunders testified supervisors manage 3000 allegations each year; they focus on the content of the ROI, not whether the subject's name, SSN, and DOB are accurate. Identification/demographic accuracy is a Fraud Investigator's responsibility.

Incarcerating an innocent person is a once in a career error that justifies removal. The Grievant actually used up his once in a career mistake with the Fettes matter a number of years ago, for which he was not disciplined. Even after the Grievant knew his errors caused the

wrongful arrest and incarceration of GF, he wrote an email to his supervisor where he again incorrectly spelled GF's name. This is incompetence beyond anyone's imagination. The BWC cannot continue the employment of the Grievant and hope and pray his errors do not cause the wrongful arrest and incarceration of another person.

Union Position

The State failed to meet its burden of proving the removal was for just cause. The Grievant was a 23-year employee who had no discipline in his file. In the course of his duties, he made a simple mistake – a common human error that had very serious consequences for an innocent individual. It was an unintentional mistake for which the Grievant has, from the very beginning, expressed his remorse and regret.

The Grievant has not tried to blame anyone else for the mistake, or to make excuses. He never minimized his role or his responsibility for what happened. He has been honest and forthcoming. He was ready to accept discipline and to take steps to ensure nothing like this would happen again. But he never dreamed he would be terminated.

The Union demonstrated BWC used a prior issue without justification, rushed to judgment, did not consider mitigating factors, and erroneously charged the Grievant with insubordination. The Union recognizes the Grievant deserves some discipline. Termination, however, is much too severe. The record does not support such a severe penalty.

The State addressed a previous case, the Fettes case, that the Grievant was not disciplined for. The Grievant was not found at fault for the problems that arose in that matter. It is highly inappropriate for the State to now try and use the events from years ago as justification for its heavy-handedness in the instant case.

BWC managers had their minds made up before they spoke to the Grievant. The rest of the process was a matter of formality.

BWC refused to consider any mitigating factors, including his 23 years of virtually unblemished service. He should have been given the opportunity to address any behavior rather than being immediately terminated.

The Union proved supervisors had the duty to review their subordinates' investigative reports. Two supervisors signed off the defective ROI in question; they were held totally faultless. Their position

description states they are to review reports for accuracy. There are no qualifiers allowing them to pick and choose what they are supposed to review for accuracy. Employees are under the impression their supervisors review all sections of their reports.

The BWC Employer Fraud Team discussed at a meeting what steps can be taken to prevent this type of mistake occurring in the future. As a result of this case, the BWC implemented a new procedure. The Grievant deserves the chance to work under this new procedure.

There is no evidence supporting an insubordination charge. Such a charge is intended for situations where there has been some communication with the employee, and clear and specific orders have been given. The Grievant was charged with insubordination only because of its severe penalty.

The innocent person incarcerated due to the Grievant's mistake settled his case against the BWC for $30,000. While that is no small amount, it is not an excessive amount for an agency the size of BWC. Discipline should not be determined by the extent of the actions taken by a third party. This method of imposing discipline is extreme and leaves no room for human error.

The Union requests the Arbitrator to reinstate the Grievant. The Grievant has learned from his mistake and is eager to return to work and resume the career to which he has dedicated 23 years.

OPINION

The BWC has the burden of proving it had just cause to terminate the Grievant's employment. Just cause in this context consists of proving: 1) the Grievant did what he is accused of doing; and 2) whether termination is appropriate under the circumstances.

The Charges Against the Grievant

The Grievant was charged with insubordination and neglect of duty. The insubordination charge is specified as "failure to follow supervisor direction and/or failure to follow a written policy." The neglect of duty charge is specified as "general" neglect of duty and "carelessness with agency information."

Insubordination

Generally, insubordination charges are based on an employee's willful refusal to follow a direct order or some kind, whether it be oral or written. Negligence in performing work, such as the Grievant's failure to

promptly enter notes into the Fraud Management System, is not considered insubordination under these circumstances.[2]

Insubordination is an inappropriate charge to have been brought against the Grievant based on this factual record.

Neglect of Duty

Neglect of duty, also known as negligence, is what occurred here. Indeed, the Grievant has admitted his negligence. He failed to take proper care while performing his duties.

The Grievant misspelled GF's name in the Memorandum of Interview. He then misspelled GF's name when running an OHLEG/LEADS check. Egregiously, the Grievant failed to enter GF's social security number and/or date of birth into OHLEG/LEADS to ensure he found the right person. Equally egregious, the Grievant failed to cross-reference his search results with GF's correct SSN and DOB contained in the Grievant's investigative file. The record shows these are standard and required tasks performed by Fraud Investigators to ensure accuracy.

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[2] *See, e.g.,* Discipline and Discharge in Arbitration, 2nd ed., BNA (2005) at p. 195:

> Insubordination is the refusal by an employee to work or obey an order given by the employee's superior....[A]n employee's refusal to work or obey must be knowing, willful, and deliberate. Mere negligence in performing one's duties is not insubordination.

Despite having recently interviewed in-person the actual GF who had submitted a bad check, the Grievant failed to look at the driver's license photo produced by the Grievant's OHLEG/LEADS search. The two men looked nothing alike.

The Grievant then filed a felony complaint against the wrong GF. Despite knowing the seriousness of creating a felony complaint, the Grievant again failed to take the time to double-check or cross-reference the suspect's name, SSN, or DOB.

The Union contends the Grievant's supervisors shared responsibility with the Grievant to ensure the accuracy of the Grievant's reports. While the Union is correct the supervisors' job descriptions state they are to review their subordinates' reports for accuracy, the Arbitrator cannot accept the Union's contention that such supervisory review includes cross-checking the subject's name, DOB, and SSN. Those are basic, foundational tasks that are done by the Fraud Investigators. The supervisors properly review their subordinates' reports for content accuracy, not for demographic accuracy.

The Grievant's multiple mistakes and reckless failures caused a man to be wrongfully arrested and incarcerated. The BWC has demonstrated

in the record that the Grievant's negligence was repeated and inexcusable.

Whether Termination is Appropriate under the Circumstances

The most significant mitigating factor is that the Grievant is a 23-year employee. Such length of service certainly must be taken into consideration when determining whether termination is appropriate.

What comes to the Arbitrator's mind is whether a demotion might have been appropriate, rather than a termination. The BWC, in fact, considered this. The Grievant's ongoing, abject carelessness with his work, however, makes a demotion difficult to implement. Indeed, even after the Grievant was told on April 5, 2013 of his errors having caused a wrongful arrest and incarceration, he prepared a memorandum that day summarizing his investigation and spelled GF's name in that 1-1/2 page memo 4 different ways.[3] Such lack of attention to detail makes it difficult, if not impossible, to employ the Grievant at BWC.

[3] I.e., the Grievant spelled the first name two different ways, and the last name two different ways.

AWARD

For the reasons stated above, the State had just cause to terminate the Grievant's employment. The grievance is denied in its entirety.

April 1, 2014

Susan Grody Ruben
Arbitrator