

1137

IN THE MATTER OF ARBITRATION BETWEEN
STATE OF OHIO, OHIO DEPARTMENT OF TAXATION

vs.

JOHNETTA GWINN & THE OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION

Grievance No. 30-04-20140106-0001-01-14

RECEIVED / REVIEWED

SEP 30 2014

OCSEA - OFFICE OF
GENERAL COUNSEL

OPINION AND AWARD

Arbitrator Meeta A. Bass
Award date September 26, 2014

Employer Advocate:

Gregory Siegfried
Ohio Department of Taxation

Megan Schenk
Office of Collective Bargaining

Union Advocate:

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Staff Representative
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Jessica Doogan
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PROCEDURAL HISTORY

The Ohio Department of Taxation is hereinafter referred to as "Employer" or "Department". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Johnetta Gwinn is the Grievant.

Union submitted Grievance No. 30-04-20140106-0001-01-14 to Employer in writing on January 6, 2014 pursuant to 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, hereinafter referred to as the "CBA" between 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 July 24, 2014 in Columbus, 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. By agreement of the parties witnesses were not sequestered. The parties were given the opportunity to submit post-hearing briefs on or before August 8, 2014, and the parties submitted them in a timely manner. Except for evidence as to which objections were sustained, all evidence became part of the hearing record which was closed on August 8, 2014.

The parties stipulated that the grievance and arbitration were properly advanced before the Arbitrator. The parties stipulated to the issue as follows:

"Was the Grievant removed for just cause? If not, what shall the remedy be?"

Pertinent Provisions of the 2012-2015 Collective Bargaining Agreement

ARTICLE 22 - PERFORMANCE EVALUATION

22.01 - Use

The Employer may use performance evaluations pursuant to the Ohio Administrative Code Chapter 123:1-29, except as modified by this Article. All Agencies shall use the current performance evaluation form, which may be revised periodically after consultation with the Union. If an Agency chooses to use a performance evaluation instrument different than that utilized by the Department of Administrative Services, it shall consult with the Union prior to implementing the new instrument. All non-probationary employees shall be given an employee performance evaluation during the sixty (60) day period immediately preceding the employee's next step increase. Those employees who are at top step shall be evaluated annually, thereafter. Employee performance evaluations shall be used for all purposes for which employee evaluations are normally used, including but not limited to, merit based incentive programs designed to award employees for specific form of job performance. The performance evaluation shall include a summary conclusion section for the supervisor to rate the employee's overall performance as either "satisfactory" or "unsatisfactory".

22.02 - Limits

Measures of employee performance obtained through production and/or numerical quotas shall be a criterion applied in evaluating performance. Numerical quotas or production standards, when used, shall be reasonable and not arbitrary or capricious. Performance evaluations shall not be a factor in layoffs. Employees shall receive and sign a copy of their evaluation forms after all comments, remarks and changes have been noted. A statement of the employee's objection to an evaluation or comment may be attached and put in the personnel file. Employees are not entitled to Union representation during performance reviews.

22.03 - Appeals

An employee may appeal his/her performance evaluation, by submitting a Performance Evaluation Review Request to the Management designee (other than the Employer representative who performed the evaluation) within seven (7) days after the employee received the completed form for signature. A conference shall be scheduled within seven (7) working days and a written response submitted within seven (7) working days after the conference.

If the employee is still not satisfied with the response, the employee may appeal his/her performance evaluation to the Agency designee (e.g., Human Resources, Labor Relations). This level of appeal shall

not be available to any employee who has received a rating of "Meets" or "Above", in all categories. The appeal shall contain a reason and/or documents to identify why the performance evaluation is not accurate. Any documents used by the Employer in evaluating an employee's performance shall be furnished by the Employer to the employee upon request. The Agency designee may hold a conference or do a paper review of the performance evaluation. A written response will be issued within fourteen (14) calendar days after the appeal is requested. The performance evaluation appeal process is not grievable, except as outlined below:

If an employee is denied a step increase because his/her overall performance is rated "unsatisfactory," the employee may appeal such action directly to Step Three of the Grievance Procedure. If the grievance is unresolved at Step Three, appeal may be taken to the Office of Collective Bargaining. No further appeal may be taken. Should the appeal be successful, the step increase shall be retroactive to the date on which it was due. If the employee's performance evaluation is not completed on time, the employee shall not be denied a step increase.

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. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 - Progressive Discipline

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

Ohio Department of Taxation, Standards of Conduct, Number: ODT-002

6. Discipline

The Department is committed to progressive discipline for civil service and bargaining unit employees. Employees are responsible to comply with the standards of conduct and work rules. Discipline does not have to be for a

same or similar offense to be considered for purposes of progressive discipline. Even though the Department maintains a policy of progressive discipline, the seriousness of misconduct does not always warrant strictly progressive discipline. For example, a serious failure of good behavior (e.g., theft in office) may result in a suspension or removal even in the absence of any active disciplinary record. The seriousness of violation(s), tenure/overall work record, and other relevant considerations will determine the severity of disciplinary action imposed by the Tax Commissioner or his/her designee.

6.3.4 Grounds for discipline set forth in O.R.C Section 124.34 are incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director or administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

6.3.6 Standards of conduct and work rules are applicable to all employees. Disciplinary guidelines identify disciplinary actions that generally would be commensurate with the violation.

Joint Documents

1. The Contract between the State of Ohio and the Ohio Civil Services Employees Association, OCSEA, AFSCME Local 11 AFL-CIO, 2012-2015,
2. Grievance Trail, Grievance # 30-04-20140106-0001-01-14,
3. Removal Letter dated January 6, 2014 by Tax Commissioner Joseph W. Testa to Johnetta Y. Gwinn,
4. Pre-Disciplinary meeting officer's report dated December 27, 2014 by Patricia Palmentera, Pre-Disciplinary Meeting Officer, to Tax Commissioner Joseph W. Testa to Johnetta Gwinn, and
5. Pre-Disciplinary meeting notice dated December 20, 2013 by Charles Kumpar Human Resources to Johnetta Y. Gwinn with attachments Bates' stamped 00000001-00000091.

Employer Position

Employer contends that Grievant violated Work Rule #31, Neglect of Duty defined as the failure to meet work standards for quality or quantity of work to be performed and 3h- Neglect of Duty defined as unsatisfactory work performance. Grievant failed to routinely produce an average of at least 75 pieces or correspondence and/or items per day of

the department work in a satisfactory manner. Employer maintains there was sufficient inventory of work to be completed by Grievant. Grievant knew the expectation of the Employer regarding her productivity and was instructed to increase her productivity. Grievant failed to complete her tasks in violation of Work Rule #31 and 3h.

Employer contends that Grievant was removed from her employment as a Tax Commissioner Agent (hereinafter TCA) 1 for violation of the departmental work rules with just cause. Grievant had notice of the work rules and failed to comply with the expectations of the Agency regarding her work productivity. Grievant acknowledged that she knew that she had to produce 75 piece of correspondence per day. Grievant rated unsatisfactory on every category of her annual performance evaluation for the period of 03/21/2012-05/31/2013. Employer provided training and coaching to resolve performance issues. Her supervisor implemented a thirty (30) day Performance Improvement Plan (hereinafter PIP) to help address and resolve issues to increase her productivity. Grievant did not perform her duties as a TCA 1. Employer had just cause to remove Grievant.

Employer contends the removal was progressive under Article 24 of the CBA and consistent with the Department's Policy ODT-002 Employee Standards of Conduct. The overall work record of Grievant was poor. Grievant was twice demoted, and had an active three (3) day and five (5) day working suspension at the time of removal. Based upon her employment record, a removal is commensurate with the offense.

Employer contends that Union did not demonstrate that Grievant completed the seventy-five (75) pieces of correspondence or other items each day. The claims of Grievant that work was not made available to her were unfounded, and Grievant introduced no evidence to support such

claims during all relevant times. There was sufficient inventory of work available to meet the seventy-five (75) units. Grievant did not offer any evidence in support of her claims; therefore, the grievance should be denied.

Employer contends that that the PIP expired on July 31, 2013. The work assignment practices established by the PIP also expired July 31, 2013. If Grievant completed the daily work assigned by her supervisor, then it was her responsibility to obtain additional work from the work bins located on the wall. This was the protocol to secure work prior to the thirty (30) day PIP. Grievant failed to produce an average of at least seventy-five (75) pieces of correspondence or other items each day in violation of the departmental work rule.

Employer contends there was just cause to discipline, the removal was in accordance with progressive discipline, and the grievance should be denied in its entirety.

UNION POSITION

Union argues that Employer failed to meet its burden of proof to establish a violation of the Department's Work Rule #31, Neglect of Duty and 3h- Neglect of Duty. Initially Union points out that these charges are redundant for the same conduct, and only amount to one alleged on-going work performance problem. The various reports, spreadsheet and various documents only showed the amount of work that would have been potentially been available to the Grievant and the lack of acceptable amounts of work produced. In order to support the charge, it was incumbent upon Employer to show documentation of the actual work assigned to Grievant in order to prove that Grievant failed to complete the 75 piece of correspondence per day. Further, Employer failed to establish how her work productivity compared to her coworkers. Notwithstanding, Grievant completed the tasks assigned to her by her immediate supervisor. There was no violation of the departmental rules.

Union argues that the PIP was meaningless, and initiated by Employer as a pretext in order to support a removal. Employer failed to identify and address problem areas and training or assistance needed to improve her performance. The training on the STARS system was unrelated to her existing duties. There was no further discussion with Grievant about her performance following the completion of the PIP until the investigatory interviews in November and December 2013 with the exception of the email dated October 24, 2013. The coaching and PIP were only initiated to support a removal. Employer made no real efforts to correct behavior.

Union argues that the timing of her removal is suspect. Grievant had an active three (3) day and a five (5) day suspension on her record.

The prior disciplines of Grievant did not relate to job performance. Based upon same or similar conduct, the discipline is not progressive. Further, the five (5) day suspension was negotiated by settlement agreement to become inactive and removed from her record eighteen (18) months from the agreement. The agreement was dated July 10, 2012, and the removal of discipline from her record on January 11, 2014. Employer rushed to remove Grievant in order to maintain progressive discipline. Employer is acting in bad faith and contrary to the spirit of the CBA.

Union argues that Employer deliberately obfuscated the underlying facts and circumstances giving rise to this grievance. In support of its case, Employer called the Administrator I for the Personal Income Tax and School District Tax Division. Union maintains that contrary to the testimony of the Administrator I that she has a "hands on" management style, there are two levels of management between Grievant and the Administrator I. The Administrator I had no actual knowledge and/or observation of the daily work activity of Grievant. The best evidence was established by the person who had actual knowledge of the workload of Grievant, her immediate supervisor. The testimony of her supervisor established that he continued the practice of providing Grievant her daily workload as established in the PIP. There is only one occurrence established by the email where her supervisor expressed concerned over her productivity. The testimony of the Administrator I should be discounted because she did not directly supervise Grievant.

Union argues that the numerical number of 75 pieces of correspondence per day was a goal, and not a requirement. This numerical quota or production standard is arbitrary and capricious. It assumes that all employees can do one task in ten (10) minutes.

It does not allow for workplace conversation whether about personal matters or job-related matters. The assigned tasks are not always as simplistic as Employer opines, and when issues develop the time allotment is not sufficient as described by their witnesses. The period in question was a slow period for Employer, and there was not sufficient work distributed to Grievant to comply with the Seventy-five (75) goal per day.

Union requests that the grievance be granted, Grievant be returned to her position as TCA 1, and made whole. Grievant be granted back pay which reflects her upgrade to a TCA 2; all leave accruals, benefits, and seniority to be restored, PERS credits and contributions; and dues paid to the Union by the Employer.

BACKGROUND

The following is a statement of those facts found by the Arbitrator to be true and necessary to the Award. To the extent that this recitation differs from any party's that is the result of determinations as to credibility, determinations as to credibility, determinations of relevance, burden of proof considerations, and weighing of evidence, both oral and written.

The Ohio Department of Taxation provides for the collection and administration of state taxes and several local taxes in Ohio. Each taxpayer in Ohio, who earns or receives income in Ohio, is subject to the personal income tax based on their income and applicable deductions which is administered through the Personal Income Tax and School District Tax Division. In calendar year 2013, 6.2 million taxpayers paid a combined personal and/or school district tax, 5.5 million of which is personal income tax, and the remaining 700,000 is school district tax. Ohio has 600 school districts and almost 200 school districts that have passed a levy to sustain the growth and development of their school systems. The department charges school districts approximately 1 to 1 1/2 percent of revenue collected as an administrative fee.

In 2013, there were approximately seventy-five (75) persons working in the Personal Income Tax and School Tax Division. The organization of the Division consists of an Executive Administrator who is over multiple taxes. The Administrator I who is over the personal income and school district taxes, and is responsible for the creation of tax forms, interpretation of legislation, and updating the system to account for legislation. The Administrator II position has since been abolished. There are two

Supervisor II positions, and ten Supervisor I positions who provide support to the Administrator I. The TCAs, series 1-5, work on varying levels of issues related to personal income and school district returns with senior agents 3-5 working the more difficult returns, and agents 1-2 working the less complicated financial line items of a return. Lastly, in the division is a group of researchers who work more demographics on the return such as name, address and social security. Of these various positions within the Division, the TCA I is the only position which has an automatic reassignment to Agent II after two years of good standing. In the Unit, workflow is distributed to the TCAs I by supervisor assignment and by independent retrieval from the work bins located on a specific wall in the Unit.

Grievant is a TCA I at the Department. The job description for Grievant describes the duties of a TCA I as follows: Seventy percent of her time is "under immediate supervision, learns to perform and performs tax service programs as assigned that require little or no discretion, to interpret applicable state and federal tax laws and court cases to make decisions, conducts researches and applies technical and procedural guidelines, utilizes databases to obtain, verify and /or adjust tax account information, researches and analyzes tax returns suspended by computer system, makes necessary corrections to return through on-line entry and advises taxpayers if tax liability changes. Thirty percent of her time she "provides assistance to higher level tax commissioner agents; verifies and processes voluntary payments & misdirected tax returns; reviews and approves taxpayers requested extensions of time to file and pay tax, communicates with other governmental agencies and outside groups on routine matters." At all relevant times, the job duties of Grievant consisted of making a determination that the W2s which provided in response to

departmental requests were consistent with Data in the Departmental system, releasing suspended returns, processing returns with missing pages of the standard tax form, sorting correspondence, telephone calls and scanning documents. Grievant acknowledged that she was aware of her daily requirement of 75 units per day. Grievant acknowledged notice of the Standards of Conduct on December 4, 2012.

Grievant is a union steward. As steward, Grievant assists co-workers in processing their employment grievances and answers and educates members on their responsibilities, union rules and expectations. The CBA permits her to perform her responsibilities as steward during work time subject to approval of her supervisor. During the work day, it is not uncommon for union members to ask her questions or to bring workplace issues to her attention. There was no documentary evidence of union activity introduced as evidence.

In May of 2013 the supervisor of Grievant began coaching Grievant in an effort to improve her productivity. Her supervisor monitored her work productivity by the hour throughout the course of the days from May 1 through May 15, 2013. There were hours where Grievant completed 0 units, other times 1 unit, other times 2-3 units, still other times 6-9 units but then other times 10-18 units. His investigation showed that Grievant was not performing at an acceptable level, and his findings showed low productivity on many days but the ability to meet the daily requirement if her performance would carry throughout the day. These findings were discussed with Grievant.

In an evaluation dated June 12, 2013 the performance of Grievant was rated "below meets" in every category in her annual review for the period of March 21, 2012 through May 31, 2013. The narrative written by her immediate supervisor asserts that "Johnetta does not meet the customer focus as required in all State of Ohio performance evaluations.

Johnetta's unavailability is reflected in her low and inconsistent production numbers. Thus the customer's needs are not being met." "Johnetta needs to improve in meeting expectations relative to her competency development." "Johnetta does not meet expectations in the timely and accurately processing of returns/correspondence. Johnetta's daily production numbers are inconsistent, thus missing on multiple daily productions goals. In addition, the few times where Johnetta dramatically exceeded her daily goal resulted in an increased error rate." "Johnetta does not meet expectations in providing tax technical leadership to her internal and external customers. Johnetta's unavailability is reflected in her low and inconsistent production. Her high error rate has a negative impact in fulfilling her customer's needs." "Johnetta needs to improve in meeting her goals & performance expectations. Johnetta needs to strive for consistency and accuracy while maintaining a steady workflow throughout the day." The narrative also asserts that Grievant needs improvement in meeting her goals and performance at the Department, and her immediate supervisor generated a PIP. Grievant acknowledged receipt of the performance annual review on July 1, 2013.

On July 1, 2103, Employer established a PIP. The PIP identified productivity and accuracy in tasks as to the specific areas in which Grievant was deficient. To address this deficiency, the PIP required Grievant to complete the Agency goal of 75 suspense items per day. No training was provided; the PIP solely concentrated on productivity. The PIP indicated that Grievant would be distributed work daily at the beginning of the day and will rubber band the daily work assignments and return to her supervisor at the end of the day. The PIP further required Grievant "to update a minimum of 75 suspense items per day, to include any one of the following:

- i. SD W2/1099 Correspondence

- ii. IT W2/1099 Correspondence
- iii. Suspense Error Code 613 w/aged letter requesting W2/1099 (AKA>45days edit) or

Agent will review 75 missing pages returns & correct those returns based on current guidelines.”

A notation indicates that Grievant may be required to work both. If working both a combined total of 75 missing pages and suspense items must be worked. The PIP did not provide any notice that a failure to improve in her performance within the specific time period could be grounds for termination of her employment.

By the terms of the PIP, it expired on July 31, 2013. The results of the PIP were provided to Grievant. Grievant did not successfully complete the PIP; she was not disciplined. However, her supervisor continued the practice of distributing work daily at the beginning of the day in her personal tray and Grievant would rubber band the daily work assignments and return them to him at the end of the day. As a result of this continued practice, Grievant did not independently retrieve work from the bins on the wall. Grievant maintains that she completed the work which was assigned to her while her supervisor maintains that he provided her sufficient work to meet her daily requirement of 75.

On October 24, 2013 the immediate supervisor of Grievant sent an email to Grievant regarding her work assignment from the previous day. The email read:

Johnetta:

Please document the work and/or assignments that you completed on Wednesday, October 23, 2013. Your production report is only reflecting that you scanned yesterday. I do not see where any W-2's were updated for 613 and/or 621 error code(s). Please work the W-2 responses dated on 10/22 & 10/23 that are in your in tray.

Please be sure that you are keeping up on the W-2 responses daily.

Grievant responded:

Randy,

Yes, my production report is accurate.

Yesterday I scanned all day because there were no W-2 requests available or in my tray to complete.

I will complete the W-2 request you put in my tray today.

Her supervisor did not respond to the email.

Employer continued to closely monitor the productivity of Grievant following the expiration of the PIP. Employer tracked her productivity as follows: For the month of August of 2013, Grievant worked a total of 18.833 days or 141.25 hours assuming 7.5 works in a day. With a daily required production of 75, the monthly required production is 1341.5. Her actual monthly production is 822 and her actual daily production was 43.646. Grievant completed 61.27% of job duties resulting in a deficiency of 38.73%. For the month of September of 2013, Grievant worked a total of 15.467 days or 116 hours. With a daily required production of 75, the monthly required production is 1160.0. Her actual monthly production was 857 and her actual daily production was 55.409. Grievant completed 73.88% of job duties resulting in a deficiency of 26.12%. For the month of October of 2013, Grievant worked a total of 10.2333333333 days or 76.75 hours. With a daily required production of 75, the monthly required production is 767.5. Her actual averaged daily production was 356 and her actual daily production was 34.78827362. Grievant completed 46.38% of job duties resulting in a deficiency of 53.62%. For the month of November of 2013, Grievant worked a total of 13.04 days or 97.8 hours. With a daily required production of 75, the monthly required production is 978. Her actual averaged daily production was 530 and her actual daily production was 40.64417178. Grievant completed 54.19% of job duties resulting in a deficiency of 45.81%. Based thereon, the Administrator I recommended discipline.

On January 6, 2014, Grievant was removed from employment with

the Ohio Department of Taxation for violation of Departmental Work Rules 31-Neglect of Duty - Failure to meet work standards for quality or quantity of work to be performed; and 3h-Neglect of Duty-Unsatisfactory work performance. At the time of her removal, Grievant had a three day suspension for violation of Department Work Rule 6B, Dishonesty, and a five day suspension for violation of Departmental Work Rule 3C1, Absenteeism, as active discipline. Grievant received probationary demotions for unsatisfactory performance from Tax Commissioner Agent 1 from two other Divisions in the Department. Union filed its grievance on January 6, 2014, alleging a violation of the Article 2, 22 and 24, of the Collective Bargaining Agreement. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration. Union withdrew the allegation of Article 2 at the arbitration hearing.

DISCUSSION

Employer issued the letter of termination on January 6, 2014. The letter provided notice to Grievant that she was being terminated due to a violation of Departmental Work Rules 31-Neglect of Duty - Failure to meet work standards for quality or quantity of work to be performed; and 3h-Neglect of Duty-Unsatisfactory work performance. It is the Employer's responsibility to demonstrate that its decision to discipline and discharge Grievant is supported by just cause. When analyzing cases claiming just cause for disciplinary and dismissal actions, an arbitrator must consider whether or not; (1) employer followed practical business policy for the disciplinary action, (2) employee was adequately educated on business policy and violation consequences, (3) employee was provided a fair investigation (4) employer's decision was justified by substantial evidence, (5) disciplinary action was appropriate relative of the offense (6) discipline has been consistently applied to other employees charged with violation of the same or similar rules.

It is the position of Union that these charges are redundant for the same conduct, and only amount to one alleged on-going work performance problem. The Arbitrator agrees. The Departmental Rule 3H-Neglect of Duty, unsatisfactory work performance, is a broader charge, encompassing a wide variety of conduct. Whereas, Departmental Rule 31-Neglect of Duty, failure to meet work standards for quality or quantity of work, is a more specific charge under the umbrella of the broader charge of unsatisfactory work performance. In that the evidence presented is more specifically related to productivity there is only one alleged offense- a violation of Departmental Rule 31-Neglect of Duty, failure to meet work standards for quality or quantity of work.

Union took exception to the daily production of 75 units. An Agent 5 who works in the same unit as Grievant for approximately two and half

years testified on her behalf. She is a lead Agent and as a lead agent, she is assigned more technical work and is a resource for lower level agents. For the 2013 tax filing season, March, April and May of 2013, the Agent was pulled from her regular duties to assist with the W2 and other related tax work. A projection of her daily actual production reports estimate that she would complete an average of 49.5 per day which is less than the 75 units per day. Her rate was dependent upon the nature of the income tax research personal income versus school district tax. According to Agent, more time should be allotted to school district tax research because of the extra steps required to process the item. The processing of school district tax requires additional time affecting the ability to meet the seventy-five (75) units. She admits under cross examination that she was responsible for keeping up with her own job while assisting with the W2 work. While Union raises the issues of steward activity during the work day affecting productivity, no documentary evidence was presented to support Union's burden of persuasion at all relevant times.

Employer did not establish the manner in which the ten minute allotment for each unit was determined. However, the nature of the work was discussed in great detail, and the testimony was consistent amongst the witnesses that for most W2 correspondence the average processing time is ten (10) minutes with exception for school district and multiple W2s submitted which may extend the time to fifteen (15) minutes. An averaged ten (10) minute period is thus reasonable.

Union argues that Employer failed to show the productivity of the other Agent 1s in the unit in comparison to the productivity of Grievant. Employer presented ample evidence of the limited nature of the work performed by Grievant, and the time allotted for such work. The Administrator I testified that the Division is not so rigid as to not take into account the variances that may occur in the routine work that may require

more attention. She testified that if the overall daily production of Grievant was at 65, Grievant would not be in this position. Employer was able to demonstrate and identify the daily work product of Grievant, and show that she was able to produce 65 and better. With the consistent testimony of both sides establishing that the average time is ten (10) minutes, the comparison of the productivity of other coworkers is redundant. Once Employer established this evidence, the burden of persuasion shifted to Union to present such other evidence. Moreover, if the Union was concerned with disparity of treatment, it was their burden to produce the evidence of disparity.

Union further opines that Employer did not meet its burden of proof to establish that a violation occurred in that her immediate supervisor continued to distribute a specific workload. Employer maintains that this distribution did not excuse Grievant from processing 75 units per day. It is undisputed that the immediate supervisor of Grievant continued the practice of distributing the daily assignments to her, and she returned her rubber band work to him at the end of her shift. Grievant maintains that she completed her work assignments given to her, and therefore she cannot be charged with neglect of duty.

It is troubling that her email states that "Yesterday I scanned all day because there were no W-2 requests available or in my tray to complete." Her explanation that she meant available in my tray is disingenuous. The word or is disjunctive, commonly meaning one or the other. Grievant signed the PIP and acknowledged that she received a copy of the results. Both as Grievant and as a union steward of nine years, Grievant knew that the terms of the PIP had expired. She acknowledged under cross examination that she knew the requirement was seventy-five (75) units per day, and that the work assigned did not meet that requirement. Her attempts to address this matter with her supervisor were undocumented.

Finally, her explanation of the email is in direct conflict with that of her supervisor when he testified that it was customary for him to distribute certain work to employees which was to be supplemented from the work bin on the wall. Grievant clearly articulated her job duties and tasks at the arbitration hearing; she appeared knowledgeable and had extended on the job training as a TCA I due to prior discipline. It is appropriate to defer to the judgment of her supervisor when in fact Grievant did not identify any training that would have been useful in improving her performance. A review of the productivity reports establishes that Grievant failed to perform her duties on an on-going basis. Grievant is in violation of Departmental Rule 31-Neglect of Duty, failure to meet work standards for quality or quantity of work.

Grievant was removed for said violation. One of the elements of a just cause determination is that the discharge penalty imposed must be commensurate with the offense. In other words, was the removal proportional to the seriousness of the offense under the totality of circumstances? Grievant was under the supervision of her supervisor for three to four years until such time she was placed under the supervision of another unit supervisor in mid-November of 2013. Her supervisor for the relevant period of time testified on rebuttal. Her supervisor stated that Grievant was under close supervision. He initially testified that he assigned Grievant sufficient work to meet the unit requirement and tracked her production reports; however, he did not document what work he actually assigned to Grievant. Under cross examination, he stated that Grievant knew that if she completed the W2s she should then retrieve additional work from the bins on the wall. When asked again, his response was that in accordance with the PIP he distributed her W2s as they came into the unit, and she would work correspondence from the work bins on the wall. Notwithstanding, the terms of the PIP indicated that Grievant would be

distributed work daily at the beginning of the day and would rubber band the daily work assignments and return them to her supervisor at the end of the day. The PIP expired on July 31, 2013. He testified that he did have conversations with Grievant about retrieving work from the wall. When asked about a specific time reference; he could not recall. When asked again, he confirmed the testimony of Grievant that he did not reinstruct Grievant on the assignment protocol following the expiration of the PIP. The supervisor and Grievant continued the practice of distributing work, and returning the same in a rubber band at the end of the day as outlined in the PIP. He acknowledged that he did not respond to her reply email nor did he clarify to Grievant at that time that she should be retrieving work from the bins on the wall to supplement the work which he distributed to her instead of doing nothing. Grievant testified that she attempted to have conversations with him about the limited work assignments but he ignored her. When asked on redirect, her supervisor reiterated his original statement on direct examination that he distributed to Grievant sufficient work to meet her assignment. His responses were vague, uncertain, inconsistent, delayed, and he asked for continued clarification before answering. His testimony raises certain red flags. If he was distributing to her sufficient work then why did she need to retrieve additional work from the bins. If he was tracking her productivity, why then did he not warn her that low productivity may lead to discipline.

There was no evidence of any corrective action taken to address and resolve any performance issues from March 21, 2012 through April 30, 2013. Grievant received 'below meets" on every category of the evaluation for this period. Her supervisor overall concern was production and increased error when production increased. Yet, no intervention in her work performance, through counseling, discipline, or training during the period of March 21, 2012 through April 30, 2013. In May of 2014, her

supervisor developed a coaching tool where he tracked her daily work activity. Again, his findings at this time only addressed production and not errors her work product; Grievance performance was poor. Yet, there was no discipline. He creates a PIP as part of the annual review, but even though he comments on her competency and technical ability, yet, there was no training is made a part of the PIP. Grievant completed 61.27% of job duties resulting in a deficiency of 38.73% in August, 2013, 73.88% of job duties resulting in a deficiency of 26.12% in September, 2013, and 46.38% of job duties resulting in a deficiency of 53.62% in October and with the exception of the email dated October 24, 2013, there was no supervisory intervention when his testimony was that he tracked her production reports.

Employer limited its consideration of mitigation to tenure, employment record, and poor job performance and failed to consider failure of supervision as a mitigating factor. Removal is not commensurate with the offense.

Based on all the foregoing, Grievant did violate Departmental Work Rules 31-Neglect of Duty - Failure to meet work standards for quality or quantity of work to be performed. There is just cause to discipline. Under these circumstances, the discharge of the Grievant was not commensurate with the Grievant's offense. If the only consideration in this instance was the employment record, Grievant's work performance, and tenure, Grievant should be removed. However, Employer is equally at fault in its failure to supervisor. The supervisor was lax in his enforcement of the departmental work rules on neglect of duty against this Grievant for approximately one and a half years. Grievant who acknowledged receipt of the rules and understood the instructions to meet the 75 units per day failed to take the initiative to independently meet the

requirements in spite of the lack of enforcement by her supervisor. Back pay is inappropriate with her work ethic. Employer did not have cause to remove.

AWARD

Consistent with the foregoing, the grievance is sustained in part. Grievant violated Departmental Work Rules 31-Neglect of Duty - Failure to meet work standards for quality or quantity of work to be performed, and the discipline is modified. Grievant shall be reinstated to her former position as TCA I, with no back pay. The term of her suspension shall be equivalent to the number of days equal to the date of removal through the date of her return. Grievant shall be turned to work within fourteen days of this Award. Grievant shall be placed on a Performance Improvement Plan for ninety (90) days to address issues related to competency and production. Training shall be provided.

Dated: September 26, 2013

/s/ Meeta A. Bass

Arbitrator