Decision #1181

IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Commerce COM—2018-04009-14

AND

Ohio Civil Service Employees Association,

Max Miles Grievant

****

ARBITRATOR: Meeta A. Bass
AWARD DATE: August 23, 2019

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APPEARANCES FOR THE PARTIES
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PROCEDURAL HISTORY

The Ohio Department of Commerce is hereinafter referred to as "Employer." Ohio Civil Service Employees Association is hereinafter referred to as "Union." Max Miles is hereinafter referred to as "Grievant."

Grievance No. COM-2018-04009-14 was submitted by the Union to Employer in writing on November 25, 2018 pursuant to Article 25 of the parties' Collective Bargaining Agreement. Following unsuccessful attempts at resolving the grievance, the Union requested that the grievance be advanced to arbitration.

Pursuant to the Collective Bargaining Agreement between the Employer and Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on June 24, 2019 in the offices of Ohio Civil Service Employees Association located at 390 Worthington Road, Westerville, OH 43082.

The parties stipulated to the issue to be resolved as follows:

> Did the Ohio Department of Commerce remove the Grievant from his position as an Accountant/Examiner 3 for just cause? If not, what shall the remedy be?

The parties stipulated to the following facts:

1. The Grievance is properly before the Arbitrator. There are no procedural objections.
2. Max Miles began employment with the Department of Commerce as a Clerk 3 on December 16, 2013, in the Division of Liquor Control.
3. On March 8, 2015, he promoted to a Customer Service Assistant 1 position in the Division of Industrial Compliance.
4. On November 15, 2015, he promoted to an Administrative Professional 2 position in the Division of the State Fire Marshall.
5. On July 24, 2016, he moved laterally to an Accountant/Examiner 2 position with the Division of Liquor Control.
6. On November 1, 2017, he promoted to an Accountant/Examiner 3 position within the Division of Liquor Control.
7. Max Miles was removed on November 16, 2018.
8. At the time of his removal, he had no active disciplinary actions.

During the course of the hearing, both parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The following individuals testified at the hearing:

Cassandra Hicks, Deputy Superintendent and Chief of Licensing
Kevin Wymer, The HUB Security Officer
Max Miles, The Grievant

Witnesses other than the representatives were sequestered during the hearing.

Joint Exhibits

1. The Collective Bargaining Agreement between State of Ohio and OCSEA, 2018-2021
2. Grievance Trail
   * Copy of Grievance COM-2018-04009-14
3. Commerce Investigation D/I-015035-10-18
4. Discipline Trail
   * Pre-Disciplinary Notice (without attached Report of Investigation)
   * Pre-Disciplinary Report and Recommendation
   * Request for EAP Consideration
   * Removal Notice
5. Commerce Policy 201.0-Discipline

The parties elected to file post-hearing briefs within thirty (30) days. The Arbitrator received closing briefs from both parties on July 5, 2019, at which time the record was closed.

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND DEPARTMENT POLICIES

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….

Discipline Policy Number 201.0

I. Disciplinary Guidelines

A. Disciplinary action is tended to correct employee behavior and will be imposed at the lowest level appropriate for the offense. This policy provides a list of offenses and the recommended corrective action associated with each violation. An employee may also be charged with violating a specific policy or procedure that was issued or communicated at the Department, Division, Bureau, Section or front-line superior level….

In a case where disciplinary action is contemplated, voluntary participation in the Employee Assistance Program (EAP) may be considered as a mitigating circumstance, but only if a formal EAP agreement is entered into. Upon successful completion of the EAP agreement, the agency head or designee may give consideration to modifying the contemplated disciplinary action. (See the description of the EAP program contained in this manual.)

V. Disciplinary Grid

Disciplinary action shall be commensurate with the offense. The following is a list of offenses and their penalty. This list is merely illustrative and is not intended to be all inclusive. The department reserves the right to impose lesser or greater discipline depending on the circumstances of the offense. Factors considered in applying the appropriate penalty for an infraction include, but are not limited to, the severity of the offense, the employee's disciplinary record, and mitigating circumstances, if any. Discipline does have to be for like offenses to progress to the next level.

III Progressive Discipline

The Department follows the principles of progressive discipline. Discipline will become more severe if misconduct is not corrected. Disciplinary action will progress as follows:

1) Verbal reprimand
2) Written reprimand
3) 2-Day Suspension
4) 5 day Suspension
5) Removal

Disciplinary Grid

VIOLATION		1st Offense	2nd Offense	3rd Offense	4th Offense	5th offense
Insubordin-ation	Failure to Follow written or known policies, procedures, practices and/or supervisory direction	Written Reprimand	2 day suspension	5 day suspension	removal	
Any Act that embarrasses, discredits or interferes with the Department's mission		Depends on	the severity	of the	offense.	

STATEMENT OF FACTS

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

A coworker of the Grievant filed a complaint against Grievant. The complaint alleged that the Grievant was harassing his coworker and that the Grievant signed the name of the permit holder on a check that was received unsigned with a renewal application. The coworker had been journaling the activities of the Grievant throughout the work day. Based on the complaint, the Employer initiated an investigation. The harassment allegation was unsubstantiated, and the signing of a permit holder's check with consent was substantiated. While the investigation into the coworker's allegation was going on, the Employer received another complaint regarding the Grievant. On October 1, 2018, a permit holder contacted the Division to report that the Grievant had threatened the business with non-renewal of its permit after being told to leave the premises on September 29, 2018. Another investigation was initiated into this allegation.

The Deputy Superintendent contacted the permit holder regarding the check. The permit holder acknowledged that he had mailed his application and submitted an unsigned check. The Grievant mailed the request for a signed check on May 24, 2018. The Division issued an authority to operate (which acts as a receipt of payment) on May 25, 2018. The permit holder did not identify the Grievant as the caller; only as a young man. The permit holder acknowledged that he authorized the signing of his name in order to timely submit his application. When Grievant was questioned on the incident, the Grievant denied signing the check. He acknowledged that the procedure for an unsigned check is to return the unsigned check to the permit holder with a letter asking them to sign the payment and return it. Based on the number of

this permit, the Employer determined that the permit would have been assigned to the Grievant. According to the Grievant, when the deadline for applications is approaching, many coworkers pitch-in to get the applications timely processed.

On October 1, 2018, the Division received a complaint from a permit holder that Grievant had been asked to leave its establishment and threatened to not get its permit renewed. On September 29, 2018, the Grievant explained that he was invited to socialize with his estranged wife at the Hub. When he arrived, he was ignored by his wife and her group of friends. While in the restroom, the Grievant's wife and her friends told another security officer that the Grievant worked for Liquor Control. For approximately one hour or so, the security officer was directed to watch him without incident. When a verbal altercation occurred, the Grievant was asked to leave the establishment after he finished his cigarette and beer in the patio area of the establishment. The security officer testified that he escorted the Grievant to the gate after he finished his beer and cigarette. After the security officer started walking away and after the Grievant was out of the gate, the security officer stated that the Grievant stated "you fucked up, I work for Liquor Control. I'll see to it you don't get your permit renewed." The Grievant denied making the statement. The video does not have audio so there is no independent verification to support either the Grievant or the security. The video does show the security officer escorting the Grievant, then walking back toward the inside of the establishment, and then suddenly walking back to the gate area.

On November 16, 2018, the Employer terminated the Grievant for violation of Work Rule 2 and 5. The Union filed its grievance on November 25, 2018. The grievance was not resolved within the procedure established by the Collective Bargaining Agreement and was properly advanced to arbitration.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

The Employer contends that the Grievant violated Rule 2, Insubordination-failure to follow written or known policies, procedures, practices and/or supervisory direction. The Deputy Director received a complaint against the Grievant by his coworker that contained an allegation that the Grievant signed a permit holder's check. The Deputy Director contacted the permit holder who confirmed that he submitted an unsigned check, and following a conversation with the young man, he authorized him to sign the check. Based on the number of this permit, it would have been assigned to the Grievant. The Grievant acknowledged that an unsigned check is processed with the return of the unassigned check to the permit holder with a letter asking them to sign the payment and return it. The Employer maintains that the evidence establishes a violation to follow policy.

The Employer contends that the Grievant violated Rule 5 - Any act that embarrasses, discredits, or interferes with the Department's Mission. On September 30, 2018, the Division received a complaint that the Grievant had been asked to leave the establishment, and upon leaving, the Grievant identified himself as an employee for Liquor Control and threatened to make sure that their permit was not renewed. The Employer does not dispute the relationship between the Grievant and his wife but argues that it is not relevant because he made the threat and the evidence does not indicate that his wife was involved. The Employer maintains that his statement violated Rule 5.

The Employer also contends that it has established its burden of proof by a preponderance of the evidence. The Employer introduced credible evidence that the matter was reported by the owner of the establishment the day after the event, and the investigation, interview of witnesses, sworn affidavits, video review that supported that the statement was made, and the testimony of the security officer to support the charge of Rule 5.

The Employer further contends that the discipline was reasonable in consideration of the facts and circumstances of this case. The Employer admits that if Rule 2 was the only charge, the Grievant would not have been removed solely for signing the check on behalf of the permit holder. The Employer asserts that the more serious charge is the Rule 5 violation; the Grievant threatened to interfere with the renewal application of a permit holder. The Employer argues that in his role as Accountant/Examiner 3, the Grievant has the ability to impact the permit holder's permit by destroying or delaying the renewal application or process. As a regulator, the Division cannot allow this

type of behavior that leaves permit holders questioning the validity or continuity of their permits. The Employer argues that the Grievant's tenure of fewer than five years does not support mitigation of the penalty.

Moreover, the Employer contends that the removal did not violate the CBA and the American Disabilities Act (ADA). The Employer acknowledged his veteran status. The Employer asserts that the Grievant never disclosed his PTSD disability until this investigation began. The Employer had not been provided with any medical verification of his particular symptoms caused by this condition. The Employer also asserts that Grievant never requested an accommodation until this incident, and Grievant failed to connect the alleged disability to his action. The Employer further asserts that the EEOC provides the following guidelines when an employee mentions a disability and/or need for accommodation for the first time in response to counseling or discipline for unacceptable conduct: "If an employee states that the disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation. The language of the Article 24.10 of the CBA is discretionary, "in cases where disciplinary action is contemplated and the affected employee elects to participate in the OHIO EAP, the discretionary action may be delayed until completion of the program." Although the request was made, the Director elected to proceed. The Employer maintains that neither the ADA or the CBA requires accommodation in this instance.

Lastly, it is the position of the Employer that there was just cause for the discipline. The grievance should be denied in its entirety.

POSITION OF THE UNION

The Union contends that the Employer failed to conduct a fair investigation of the incident. Based on the Grievant's allegation that the incident was a set-up by his estranged wife, the Deputy Superintendent visited the HUB. She spoke with the owner and the security officer but did not speak to other security staff who had worked that evening and had knowledge of pertinent information to the investigation. The security officer testified that the other security officer, who is his wife, overheard statements of the Grievant's wife in the restroom. The security officer's wife told him that one of the women in the restroom stated that the Grievant worked for the Division of Liquor Control. The Union argues that without interviewing these individuals, the Deputy Superintendent could not properly assess all the facts and truthfulness of the statements made by the owner and security officer. In addition, the Deputy Superintendent's report indicates that the Grievant's spouse stated on

several occasions that Grievant worked for the Department of Liquor Control. The Union maintains that the Employer failed to conduct a fair investigation and therefore, there was no just cause to discipline.

The Union contends that the Employer failed to establish a violation of Rule 2. The Union asserts that the Employer did not provide any documentation of a policy or procedure which prohibited the alleged actions of the Grievant. The Union argues that even if the Grievant signed the check with the permit holder's consent, the permit application was completed by the permit holder. Therefore, the Union asserts there was no falsification or dishonesty, nor was the Grievant charged with Rule # 8 (Violation of Ethics Policy) or Rule #7 (Dishonesty). The Union also asserts that although the coworker alleged that this happened twice, the Employer only presented evidence of one occurrence. The Union argues if a violation is found, the Grievant had no discipline on his record, and the next step in progression in accordance with the Employer's grid is a written reprimand.

The Union also contends that the Employer failed to establish a violation of Rule 5. The Union argues that the Employer did not provide any definitive documentation that the Grievant made the comment. There was nothing on the camera recording showing that the Grievant was irate or confrontational after being asked to leave. The recording does not show the reason why the security officer turned the second time to proceed to the gate. Based upon his temperament at the arbitration hearing, the Union argues that the security officer would have confronted the Grievant if such a comment had been made. The Union maintains that the Employer failed to meet its burden of proof.

Further, the Union contends that the testimony of the security officer is not reliable and there were inconsistencies in his testimony. The security officer admits to watching the wrong guy for an hour; this statement indicates that he had been directed to watch the Grievant an hour earlier. The security officer stated that the people on the patio did not appear to be paying attention to the alleged incident. The Union maintains that the Employer has failed to meet its burden of proof.

Moreover, the Union contends that the penalty must be set aside due to no just cause for the discipline. In the alternative, the Union contends that the Employer failed to make accommodation for the Grievant who is a disabled military combat veteran diagnosed with PTSD with an honorable discharge, receiving several medals in connection to his service time. The Union asserts that under the ADA, post-traumatic stress disorder is a covered disability that is protected, and the Employer is restrained from treating an employee unfavorably in all aspects of employment including termination. The Union argues that the Employer also failed to provide reasonable accommodations

to the Grievant who has PTSD and take corrective measure to address these underlying issues that were beyond the Grievant's control.

Lastly, it is the position of the Union that the grievance should be granted. The Grievant should be returned to his position and awarded back pay, reimbursed for any medical or hospital expenses incurred during the period from the date of the removal to the date of reinstatement, restore his seniority credits and leave balances that he had at the time of removal and those he would have accrued since his removal, reimburse the Union for any dues incurred during that period, and otherwise make the Grievant whole.

DISCUSSION

Article 24.01 of the CBA reads:

> 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.

The CBA does not define the term "just cause." Just cause is generally defined as a measure of whether the discipline was reasonable under all the circumstances. The critical factors in that determination are whether the employer proved the charged misconduct, whether the employee received the requisite due process notice and fair investigation, and whether the penalty was a reasonable response to the proven misconduct. The Employer bears the burden of proof and the quantum of proof, in this case, is the preponderance of the evidence standard.

The Employer charged the Grievant with violation of Work Rule 2-Insubordination-failure to follow written or known policies, procedures, practices and/or supervisory direction. The Union challenges the Rule 2 charge due to the lack of a written policy. However, a careful review of the rule gives notice of disciplinary action for written or *known procedures or practices.* At the arbitration hearing, the Grievant accurately articulated the procedures for handling unsigned checks. Therefore, the Arbitrator finds that Rule 2 is applicable in these circumstances.

The Union challenged at the arbitration hearing that the checking handling process as set forth in Exhibit H is ambiguous. The procedure reads:

"Note: When a Renewal application and check are received with 14 business days or less of a deadline and there is a problem with the check (not executed, incorrect amount, etc.) as a matter of courtesy the examiner should contact the Permit Holder by phone to attempt to resolve the issue rather than return the application and check."

The known practice under Exhibit H was to return the check or invite the permit holder to come into the facility and sign the check. The Grievant testified that he was aware of this practice and offered only a statement of non-denial to the accusation: that he did not remember signing any checks.

Although the permit number assigns the application to the Grievant, the Grievant stated that it is not uncommon for coworkers to help each other process these applications in order to meet deadlines. If this is true and it could be shown that his coworkers did in fact provide him assistance, then Grievant would be successful in establishing an affirmative defense. However, a mere assertion of an affirmative defense does not meet the Grievant's burden of persuasion.

Thus, regarding the Rule 2 charge, the Arbitrator finds that the Employer has satisfied its burden of proof. The Arbitrator notes that the Employer agrees that a violation of this rule under these circumstances would not result in a removal.

The Employer charged the Grievant with a Rule 5-Any act that embarrasses, discredits or interferes with the Department's Mission. The Union takes exception to the fairness of the investigation since the other security officers were not interviewed. The Employer does not have to interview all potential witnesses. The purpose of the investigation is to garner sufficient evidence as to whether or not a rule violation occurred. The Arbitrator notes the open-mindedness of the Deputy Superintendent to return to the establishment to question the owner and security officer regarding the

Grievant's concerns of a conspiracy orchestrated by his estranged wife. The Arbitrator finds that the investigation was fair and reasonable.

The Union argues that the Employer failed to meet its burden of proof. The preponderance of the evidence standard weighs the testimony and documentary evidence to determine if the likelihood of the occurrence is more probable than not. The Employer discussed the investigation report at the hearing and in its brief. The investigation report is admissible to prove the Employer's state of mind in initiating the investigation of Grievant's conduct but not for the truth of the statements contained therein. This Arbitrator has considered the report for the sole purpose of determining if there was a fair investigation.

The Employer called two (2) witnesses and admitted the video footage of the incident. The Deputy Superintendent discussed her investigation and the security officer testified to the events leading up to and about the alleged threat made. The Employer introduced the videotape without audio of the incident at the Hub on September 29, 2018. The videotape was played at the arbitration hearing subject to examination concurrent with testimony identifying the people involved in the incident and the time at which each event occurred. The videotape shows that 1) grievant was at the establishment 2) the security officer and the Grievant had a conversation 3) the security officer and the Grievant walking onto the patio area 4) the Grievant drinking his beer 5) the security and the Grievant walking toward the gate, 6) the security officer walking back alone and 7) the security officer suddenly turning back. The videotape supplies no evidence that the Grievant was talking to the security officer; the Grievant at this point is off-camera. The videotape also supplies no evidence of the words spoken between the security officer and the Grievant or the nature of the confrontation. The

security officer testified that he turned back because Grievant made the threat concerning the permit. The Grievant denies making such a statement, and further explains that he has no authority to deny an application. Still, something occurred that drew the attention of the security guard to the gate. The security officer reported the incident to the owner who then contacted the Division. Again, the Grievant asserts a "conspiracy defense" but fails to establish the defense by reliable competent evidence. The text message from his estranged wife that she was going to ruin his life and his Verizon telephone log that she contacted him that evening is insufficient evidence. The Grievant alone communicated the threat. The Arbitrator finds that the account and testimony of the security officer are more credible than that of the Grievant. The Arbitrator finds based on the standard of preponderance of the evidence that the Employer has met its burden of proof to establish a violation of Rule 5.

The remaining issue is whether the penalty was commensurate with the offense. It is well recognized that it is the function of management to decide upon the appropriate discipline of an employee. Absent a showing that the penalty is imposed arbitrary, capricious, discriminatory, or unreasonably harsh given the facts and circumstances of the case, the Arbitrator should not substitute her judgment for that of management even if she would have imposed a different penalty in the first instance.

Here, the Union asserts that the Employer violated the CBA when the Employer elected to proceed with discipline following the Employer failed to grant accommodations under ADA. The Arbitrator finds that the Grievant does successfully relate his medical condition as the cause of

the misconduct. The Arbitrator agrees with the Employer that the language of Article 24.10 is discretionary, and the record does not reveal any abuse of discretion. A careful review of the parties' submissions on articles related to the ADA and the case law cited therein, the Arbitrator finds that the employer did not violate the ADA. See Buie v. Quad/Graphics, Inc., 366 F.3d 496 (7th Cir. 2004) (eleventh-hour declaration of disability does not insulate an unruly employee from the consequences of his misdeeds.) In essence, the ADA allows an employer to still manage an employee's job performance. The ADA does not require further discussion about the employee's disability or request for reasonable accommodation for termination cases.

The Union argues that there was no progressive discipline. Progressive discipline is designed to provide structure corrective action to improve employee's performance and behavior. Progressive discipline may not apply to more serious offenses and would allow for summary discharge if the proven charge is commensurate with the offense. The Grievant had no discipline on his record, and the next step for discipline was a written reprimand. The Employer agreed that the Rule 2 violation would not have resulted in a removal but the more serious offense did. The Employer's policy grid provides for a range of penalty from written reprimand to removal; there is discretion in the penalty imposed. Under the just cause standard, the penalty must be reasonable based upon the totality of the circumstances. The Grievant made a threat to the permit holder that he would make sure that his application was not renewed. The Arbitrator finds that the Grievant engaged in serious misconduct, and thus, moves the penalty analysis to the right side of the grid. Although the Employer suggests that the Grievant could destroy an

application causing a delay, the Grievant had no actual authority to deny this permit in his position with the Division. There was no evidence of record that Grievant acted upon the threat. The circumstances in which the threat was communicated is a valid consideration. The threat itself was only a veiled threat. Therefore, the Arbitrator finds that summary removal is harsh, and that the penalty of time served suspension, equivalent to an estimated $36,432.00, is just and reasonable in consideration of the facts and circumstances of this grievance.

In summary, the Arbitrator finds that the Employer has just cause to discipline the Grievant for violation of Work Rules 2-Insubordination-failure to follow written or known policies, procedures, practices and/or supervisory direction and Work Rule 5- Any act that embarrasses, discredits, or interferes with the Department's Mission. The Arbitrator finds that the penalty is not commensurate offense. The penalty is modified to a time-served suspension.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance is sustained in part. There is just cause to discipline the Grievant for violation of Work Rule 2 and Work Rule 5. Grievant is returned to work with no back pay but benefits and seniority credits restored. Union dues shall be processed in accordance with customary practice. The Grievant is otherwise is made whole.

Dated: August 23, 2019 /s/ Meeta A. Bass, Arbitrator
Dublin, Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing Award was served upon the following persons via electronic service this 23th day of August, 2019:

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