#1223
Received: 8/25/2023

IN THE MATTER OF ARBITRATION BETWEEN

State of Ohio, Department of Taxation
Employer

Grievance No: Tax-2022-06542-14

And

Ohio Civil Service Employees Association
/AFSCME Local 11
Union

Ashley Zibaie,
Grievant

Arbitrator: Arbitrator Meeta A. Bass

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PROCEDURAL HISTORY

Ohio Department of Taxation is hereinafter referred to as "Taxation," "Department," or "Employer." Ohio Civil Service Employees Association is hereinafter referred to as "Union." Ashley Zibaie is hereinafter referred to as the "Grievant."

The Department and the Union are parties to a collective bargaining agreement. The Union submitted Grievance Number Tax-2022-06542-14 to the Employer on November 3, 2022, pursuant to Article 25 of the parties' Collective Bargaining Agreement, effective April 21, 2021 - February 28, 2024. The grievance alleged the Grievant was removed from service on October 24, 2022, violating Article 24of the parties' Agreement. The Statement of Grievance reads,

On October 24, 2022, I was wrongly terminated without any administrative process as outlined in the contract. This was done as a matter of retaliation due to my engaging in protected activity.

Pursuant to the CBA between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on July 14, 2023, at OCSEA at 390 Worthington Road, Suite A, Westerville, Ohio, 43082.

The Union proposed the issue as follows:
Was the Grievant, Ashley Zibaie, removed for just cause? If not, what shall the remedy be?

The Employer proposed the issue as follows:
Did the Employer constructively discharge the Grievant, or did the Employer accept the Grievant's resignation? If so, what should be the remedy?

Based on the record presented, the Arbitrator frames the issue as follows:
Whether or not the Employer violated Article 24 of the parties' collective bargaining agreement when management processed a resignation based on the Grievant's email correspondence and a failure to report to work? If so, what shall the remedy be?

The Department made an oral motion to bifurcate the issue of arbitrability and the merits of the case. Following a discussion about the grievance and the factual aspects of the grievance, both sides reached a consensus. The parties agreed on the facts about the case-in-chief and procedural issues are so intertwined that the procedural issue can only be decided by hearing all of the circumstances of the case-in-chief. The parties withdrew the Motion to Bifurcate, and after reviewing this record, this Arbitrator finds the grievance to be arbitrable.

The parties stipulated the following facts:

1) The Grievance is properly before the Arbitrator.
2) The Grievant was hired by the State of Ohio, Department of Taxation, on March 25, 2019.
3) The Grievant's position at the time of hiring was Tax Examiner Associate.
4) The Grievant's employment ended on October 25, 2022.
5) Outside counsel advised the Department to issue an acceptance of resignation.

During the hearing, both parties were afforded a full opportunity to present evidence, examine, cross-examine witnesses, and make oral arguments.

WITNESSES
The following individuals testified:
EMPLOYER WITNESSES
Alexa McKenna, Human Capital Management Manager

UNION WITNESSES
Jim Lee, President of Chapter
Ashley Zibaie, Grievant

JOINT EXHIBITS
1) Collective Bargaining Agreement Between the State of Ohio and Ohio Civil Service Employees Association, 2021-2024
2) Grievance Trail
3) Email Chain Between Ashley Zibaie and Human Resources
4) Employment History Record

5) Employee Time Card October 1, 2022, through October 29, 2022
6) Resignation Notice dated October 26, 2022

MANAGEMENT EXHIBITS
None

UNION EXHIBITS
1) Email Correspondence from Zibaie dated October 26, 2022
2) Email Correspondence from Zibaie dated September 22, 2022

The parties agreed to post-hearing submissions on August 14, 2023, and by mutual agreement extended the submission date to August 21, 2023, when the record was closed.

APPLICABLE PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY RULES.

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 the authority to modify the termination of an employee committing such abuse. Abuse cases that 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 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

Article 24.05 Pre-Discipline
An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. An employee who is charged, or his/her representative, may make a written request for one (1) continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably denied. A continuance may be longer than forty-eight (48) hours if mutually agreed to by the parties but in no case longer than sixty (60) days. In the event an employee refuses or fails to attend a pre-

disciplinary meeting, the steward and/or representative shall represent in the matter at hand. Where the affected employee is on disability, or applying for disability, and is unable or unwilling to attend the meeting, he/she shall be offered the right to participate by telephone. The call shall be initiated via speakerphone in 94 the presence of the steward and Employer representative or designee. Failure of the employee to respond to the offer or phone call shall result in the meeting proceeding without his/her presence. Any action resulting from said meeting shall not be challengeable on the basis of the employee's absence or lack of participation. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee prior to the meeting. In the event the Employer provides documents on the date of the meeting, the Union may request a continuance not to exceed three (3) days. Such request shall not be unreasonably denied. The Employer representative or designee recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut. At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-disciplinary meeting may be delayed until after disposition of the criminal charges.

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 are necessary to understand the Arbitrator's decision.

The Department employed the Grievant as a Tax Examiner Associate on March 25, 2019. The Grievant's primary responsibility was to respond to taxpayer inquiries via phone. On August 28, 2021, the Grievant was approved for short-term disability benefits. In November 2021, the Grievant's physician submitted a request for reasonable accommodation for her planned return to work date of January 1, 2022, at which time "Tax was not amenable" to her request. In February 2022, the Grievant filed a grievance citing Article 2, Discrimination, of the collective bargaining agreement resulting in a mediated settlement with the Grievant returning work in a different division with less phone time. Grievant returned to work on August 1, 2022. An incident occurred on September 20, 2022 involving the nature of her accommodations, and Grievant left work. Her email correspondence dated September 20, 2022 indicated her intention to take sick leave until the issues related to disability and accommodations were resolved.The Grievant's last call off from work occurred on October 7, 2022.

Management charged the Grievant with a rule violation. On October 11, 2022, the Grievant attended her pre-disciplinary meeting regarding her absenteeism, signing in at 8:00 AM. Following the meeting, she left work without management's approval, taking most of her personal items. Other than the email communications discussed below, Grievant had no other discussions regarding her attendance at work.

On October 11, 2022, the Grievant authored an email which read,

Good morning. I left work this morning after my PD hearing. I have told you before that the hostile work environment has harmed my health and nobody has cared. The Department has failed to abide by numerous Departmental and State policies as well as Executive Order 20 1909D. I packed up my cube because I do not expect the Department to suddenly abide by the governances has ignored thus far. However, I want to restate that I have a right to a workplace that is free from discrimination, harassment, coercion, interference or restraint. Is there any way at this point to restore the state of the employer employee relationship so that I can return to work? I would appreciate an expedient response.

On October 12, 2022, the Human Capital Management Manager responded and wrote:

Hi Ashley,
Rachel is currently out of the office. Our advice is for employees to always return to work. If you are unable to work, you have some leave available. We will alert Rachel to your inquiry. Thank you.

On October 14, 2022, Grievant authored an email which read,

Alexis,
I am not returning to work in the hostile environment that Taxation has created. I have accepted a job offer for employment elsewhere. This does not indicate my resignation. I will advocate forevermore to put an end to the types of practices that allowed what happened to me. I do not care if it's the commissioner himself who thinks it is ok to treat people this way, I will not stand for it.
Best,
Ashley Zibaie

On October 14, 2022, the Human Capital Management Manager responded and wrote:

Hi Ashley,
You indicated you have accepted another job offer. You have also indicated that you are not resigning. These two statement are incompatible. Department policy- ODT-005 Conflict of Interest states the following:
…

ODT is your primary employment responsibility. The Department has not approved you to currently engage in any secondary employment.

On October 14, 2022, the Grievant responded and wrote:

Hi Alexis,
My statements are not incompatible. First, accepting a job offer is not engaging in secondary employment. I am not resigning my position because it is my wish to work for the Department in an environment free from discrimination and harassment. If the Department continues to choose not to abide by state and Federal laws, Departmental Policy and an Executive order to allow me to work in that type of environment, then I am forced to find other employment. Essentially, if the Department isn't going to follow Departmental Policy, then I'm not either. Finally, discipline me.
Sincerely,
Ashley Zibaie.

On October 26, 2022, the Employer emailed the Grievant a letter dated October 26, 2022 and signed by the Tax Commissioner which read,

On behalf of the Ohio Department of Taxation, your resignation by refusing to return to work is accepted, effective at close of business on October 24, 2022.

On October 26, 2022, the Grievant responded and wrote:
I'm pretty sure there is a work rule related to absenteeism, correct? The same work rule the Department tried to frivolously discipline me for in May? So, the Department just isn't even going to follow administrative processes now? I am refusing to return to work because the Department has failed it legal duty to maintain a workplace that is free from harassment, discrimination and retaliation. I have asked to resolve this issue numerous times now to no avail. I have not offered a resignation, there isn't a resignation to accept.
Sincerely,
Ashley Zibaie

At the arbitration, the Human Capital Management Manager acknowledged she had received requests for ADA accommodations before October of 2022. The Grievant testified she could not make any progress towards receiving reasonable accommodations and the work environment was affecting her health.

The Union filed the grievance on November 3, 2022. At the time of her separation from employment, the Grievant's employment record included a written reprimand issued on September 22, 2022, and a one day working suspension issued on October 13, 2022. Both disciplines were for work rule violations related to absenteeism and failure to provide a physician verification. The parties were unable to resolve the grievance and advanced the same to arbitration.

POSITION STATEMENTS
POSITION OF EMPLOYER

The Department contends management correctly interpreted the Grievant's actions as a voluntary resignation and followed the appropriate procedures for such cases. The Department argues that Grievant informed Human Resources she had accepted a job offer elsewhere, began calling off work every day, and then quit calling or showing up for nine consecutive days. The Department also argues the Grievant communicated to managers her intention not to return after October 14, 2022. Subsequently, the Grievant neither reported for duty beyond October 14 nor made any form of communication or use of leave entitlements. According to the Department, these actions collectively indicate that the Grievant chose to resign from her position.

The Department also contends the provisions outlined in Article 24 of the collective bargaining agreement are irrelevant in this particular situation, as there was no intent to impose any form of disciplinary action. The Department acknowledges the disciplinary processes outlined in the parties' Agreement were not followed. Furthermore, the Department emphasizes that no adverse incidents have been documented in the Grievant's employment history within the State records. Instead, the records indicate a voluntary decision to resign from the position, and the Department followed the appropriate procedures for such cases.

The Department asks this Arbitrator to deny the grievance. In the alternative, and if the grievance is sustained, the Department requests the reinstatement to be immediate with no back pay. The Department asserts management has attempted to have the Grievant return to work on a number of occasions to no avail.

POSITION OF UNION

Union contends the Department violated Article 24.05 when management failed to investigate or hold a pre-disciplinary meeting before terminating the Grievant's employment. Union asserts that Article 24.05 states, "an employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. Union maintains the Department ignored the parties' CBA and their own departmental work rule by not investigating or scheduling a pre-disciplinary meeting, violating Article 24.

Union contends the Department violated Article 24 when management terminated the Grievant without cause. Union argues the Grievant did not resign, and her termination constitutes discipline even though management did not charge the Grievant for a work rule. Union asserts the Parties' Agreement states that no member can be disciplined without just cause. Additionally, Union references the Seven Steps of Just Cause Principles, which emphasize the requirement for a fair and thorough investigation before any disciplinary action can be taken. It is the position of the Union the Department's termination of the Grievant lacked the necessary just cause and, therefore, was unjustified.

Union further contends the purported resignation of the Grievant is unsubstantiated. Union asserts both the testimony and documentary evidence establish the Grievant had no intention of resignation. In support of this claim, the Union refers to Exhibit 1, wherein Grievant wrote, "I have not offered a resignation; there isn't a resignation to accept." According to the Union, in the absence of a voluntary resignation, the Department is limited to terminating the Grievant only for justifiable reasons. Union emphasizes

the Department had the option to charge the Grievant with violating work rule, 2N Job Abandonment, which pertains to unauthorized or unapproved absence from work for a consecutive period of three (3) days or more, but chose not to pursue this course of action. Union maintains no resignation actually occurred and contends the Department has failed to provide sufficient evidence to prove otherwise.

Union requests this Arbitrator to sustain the grievance and reinstate the Grievant to her position as Tax Examiner Associate. The Union further asks the Grievant to be made whole, including backpay, restoring her leave balances, missed overtime opportunities, medical bills, and union dues.

Discussion

At the onset of the arbitration process, the Department raised a procedural concern regarding which party carries the burden of proof. The Department's standpoint is the Grievant chose to leave her position by not returning to work and informing them of her acceptance of a new job. The Department acknowledged her actions as a resignation. Therefore, according to the Department, the burden rests upon the Union to demonstrate any instance of disciplinary action, as "just cause" is relevant to disciplinary measures rather than voluntary resignations. The Union holds a differing view, asserting that no resignation occurred. According to the Union, the Grievant never explicitly communicated her resignation verbally, and the content of her emails strongly indicates that she had no intention of resigning. The Union argues the burden rests with the Department because, in the absence of a resignation, an employee can only be terminated for just cause.

When an employer decides to terminate an employee, they are responsible for providing evidence to justify the disciplinary action under the given circumstances. Arbitral law very well establishes the employer bears the burden of proving there was just cause for an employee's discharge,

rather than it being the burden of the Union to prove lack of just cause. Conversely, when an employee voluntarily resigns, concepts associated with discharge do not generally become applicable since the employee initiated the decision to end the working relationship. In this grievance, the Department asserts the Grievant resigned voluntarily and did not return to work, citing her communication about accepting a new job. On the other hand, Union maintains the Grievant never resigned, as evidenced by her email communications.

In this specific case, this Arbitrator finds the burden of proof lies with the Department, and they must meet the "preponderance of the evidence" standard to support their claim the Grievant resigned. This is not a case where an employee actually resigned due to work conditions, and the argument becomes that of constructive discharge or a coerced resignation. This claim did not even reach that point since there is no verbal or tangible evidence of a resignation. While the email correspondence indicates that the Grievant expressed her decision not to return to work under the existing work-related conditions and mentioned accepting another job, it also explicitly states its statements should not be interpreted as a resignation. One email even suggests that management should discipline her. This Arbitrator finds the evidence of record indicates the Grievant did not resign.

Having established the Grievant did not resign, it becomes evident that her departure from employment can only be interpreted as a termination. Article 24 of the collective bargaining agreement between the parties explicitly states that an employee's termination must be grounded in just cause. The evidence presented underscores the Department's failure to comply with the negotiated terms outlined in Article 24. Notably, the Department's policy includes a provision related to job abandonment, yet no charges were made against the Grievant for violating this rule.

After determining the Department violated Article 24 of the collective bargaining agreement, the focus shifts to fashioning a suitable remedy. Remedies aim to make employees whole for their losses. With a few exceptions not applicable here, the standard remedy for a lost wages situation is to award the employee what she would have received had the Department complied with the parties' negotiated agreement. In fashioning any remedy, the Arbitrator must take into account the Grievant's work status at the time of filing the grievance. In wrongful termination cases, a typical remedy involves providing backpay and restored benefits. The "make whole" remedy is not intended for the Grievant to be 'made better' or receive a windfall from the violation. The guiding principle is to restore the Grievant to the position she would have held had the breach not occurred.

However, the specific circumstances in this case warrant careful consideration. Grievant last called off October 7, 2022 which should have placed her in a status of absence without leave. She attended her pre-disciplinary hearing on October 11, 2022 but left without management approval; the Grievant signed in and out for time keeping purposes. The evidence established the Department disbursed her accrued leave balances, and then placed on the Grievant on unauthorized leave status. On October 26, 2022, the Department “accepted” and processed a resignation.

Given the Grievant's expressed reluctance to return to work under the existing work-related conditions and her stance on the Department's alleged failure to accommodate a disability, it is evident that her intent to resume her position is uncertain. As such, the imposition of full back pay and complete reinstatement might result in an undeserved windfall, especially when her decision not to return to work was already apparent. In light of these considerations, the appropriate remedy should aim to restore the Grievant to the situation she would have been in before the termination, acknowledging the uncertainties surrounding her return to work.

In this situation, the evidence clearly shows the Grievant did not intend to return to work under existing conditions. The Grievant took a stance regarding the Department's alleged failure to accommodate a disability, which she communicated to everyone. Assuming the Grievant would have returned to work at any point is speculative, as her decision not to return was clear. In light of this, reinstating the Grievant with full back pay is deemed excessive, resulting in an undeserved windfall. Instead, the remedy should restore the Grievant to a position she would have been in before the Department’s adverse actions. Thus, the accrued leave balance are restored as part of a "make whole" remedy, and restoration of insurance, seniority benefits, leave accruals, and union dues places the Grievant back in her position before management's negative actions.

In summary, this Arbitrator concludes the Grievant did not resign but was subject to an improper termination in violation of the terms of the collective bargaining agreement. The collective bargaining agreement's Article 24 establishes strict criteria for termination, and the evidence indicates the Department did not meet these requirements. The remedy reinstates the Grievant to the position she would have been in before the Department's actions, considering her clear stance and intention not to return under the existing work conditions.

AWARD

After carefully considering this record, this Arbitrator finds the Department violated Article 24 of the parties' Collective Bargaining Agreement when management processed a resignation. Accordingly, this Arbitrator sustains the grievance in part. The Grievant is reinstated to her former position within the Department. The Department shall restore all leave balances paid arising after October 7, 2022, due to the improper termination. The Grievant is restored health insurance, all seniority benefits,

and leave accruals the Grievant would have received during the termination period. The Department shall pay all dues for the terminated period.

Dated: August 24, 2023

Meeta A. Bass
Arbitrator Meeta A. Bass

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Award was served on the following individuals this 24th day of August 2023:

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