

IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Transportation
Employer

Grievance No: DOT-2023-01206-06

And

Ohio Civil Service Employees Association
Union

AND

Grievant Dale Cooper

Arbitrator: Meeta A. Bass

OPINION AND AWARD

APPEARANCES FOR THE PARTIES

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PROCEDURAL HISTORY

Ohio Department of Transportation is hereinafter referred to as "ODOT," "Agency," or "Employer." Ohio Civil Service Employees Association is hereinafter referred to as "Union." Dale Cooper is hereinafter referred to as the "Grievant."

By letter dated April 17, 2023, the Department terminated the Grievant from employment as a Facility Maintenance Specialist, assigned to ODOT District 9 due to the alleged violation of Policy 17-015(P), items: 4C -Insolence - rude or disrespectful conduct and 4I-Any act that may discredit, embarrass, undermine or interfere with the mission of the Agency, including, but not limited to, that appearing on social media. Upon delivery of the notice of removal on April 18, 2023, the Grievant filed this grievance on the same date, alleging a violation of Articles 9 and 24. The Statement of Grievance reads,

On April 18, 2023, Grievant Dale R. Cooper was served notification of termination by the Ohio Department of Transportation. Mr. Cooper was experiencing anxiety due to months of job-related stress stemming from social difficulties. Mr. Cooper left work on June 28 due to feeling ill from the stress he had been experiencing. He went to his physician, who immediately put Him off from work. When he realized he would have to be off for an extended time, he applied for short-term disability. DAS refused to acknowledge Mr. Cooper's physician because he was a great practitioner, not a mental health professional. However, DAS failed to provide the required appointment with a mental health provider, which was their responsibility. No EAP was offered by the Employer to assist Mr. Cooper in his difficulties. The Employer informed Him that he was under investigation for rule behavior to a disabled individual who worked at the Pike County Rest area. However, no investigatory meeting took place until April 12, 2023. The Employer failed to act in a timely manner and should have not strung Mr. Cooper on for almost a year before attempting to take action. Dale was given official notification of pending disciplinary by letter on 4/4/2023, almost 10 months after the alleged violation occurred. Article 24.02 paragraph d states that action should be initiated as soon as reasonably possible. There is no way this action was taken as soon as was reasonably possible.

The Union requested that "Dale Cooper be returned to his job and allowed to complete an Employer assistance action plan" as the resolution of this grievance.

The Union submitted Grievance Number DOT-2023-01206-06 to the Employer on May 2, 2023, pursuant to Article 25 of the parties' Collective Bargaining Agreement, effective April 21, 2021 - February 28, 2024.

The Step 2 Response found the Grievant admitted to making said remarks. The remarks were a violation of policy. At the time of the removal, the Grievant had three active disciplines. The discipline was progressive and commensurate to the offense. The grievance was denied. The parties were unable to resolve this grievance, and the grievance was advanced to arbitration.

Pursuant to the CBA between the Employer and the Union, the parties have designated this Arbitrator to hear and decide said grievance. The parties presented and argued their positions on Wednesday, December 4, 2023, at the Ohio Department of Transportation Facility at 650 Eastern Ave. Chillicothe, OH 45601.

The parties stipulated the issue as follows:

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

The parties stipulated to the following facts:

1. Grievant was classified as a Facilities Maintenance Specialist 2.
2. Date of Hire: June 15, 2015
3. Date of Removal: April 18, 2023
4. Grievant had three (3) active disciplines at the time of his removal.
 - a. One (1) day working suspension.
 - b. Two (2) day working suspension.
 - c. Four (4) day working suspension.

The parties stipulated to the following Joint Exhibits:

1. Contract between the State of Ohio and OCSEA/AFSCME Local 11. April 2021-February 28, 2024.
2. Grievance Trail
 - a. Grievance Snapshot
 - b. Step 2 Response
3. Disciplinary Trail
 - a. Notice of Removal
 - b. Proof of Discipline Served
 - c. Pre-Disciplinary Officer's Report
 - d. Pre-Disciplinary Notice
4. Office of Investigative Services Report #22-45 Attachments A, B, and C
5. ODOT Work Rule Policy 17-015(P) Grievant's Position Description

Management's Exhibits

1. Voice Mail from Derek Urban dated 08.11.2022
2. Recorded Audio with Dale Cooper dated 02.03.2023
3. Cooper Disability Appeal Letter
4. OAC: 123: 123-33-03
5. Policy Signature 2020
6. Policy Signature 2022

Union Exhibits

1. WFP-0002- Employee History Report
2. Chronological Event Statement
3. Disability Leave Application
4. Certificate to Return to Work/Letters to Extend Leave Absences
5. DAS Request for Appeal
6. Appointment Records for Provider Coats
7. DAS Email Communication regarding Disability Leave
8. Cooper Email with photo attachments sent on July 26, 2022
9. Article 9 of the CBA: Ohio Employee Assistance
10. Excerpt from Policy 17-015P: Administration of Disciplinary Action

During the arbitration, the Arbitrator afforded both advocates the full opportunity to present evidence, examine and cross-examine the witnesses, and make oral arguments. The following individuals testified at the hearing:

The State called the following individuals:

Jeff Rossi, ODOT-Investigator, Office of Investigative Services
Kelly Hunter, CEO of STAR, Inc.
James Minnelli, Employee of STAR, Inc.
Lisa Settle, Employee of STAR, Inc.
Cindy Newman, Registered Nurse of STAR, Inc.
Ed Cox, ODOT-Program Administrator 3
Neil Glendening, ODOT-District 9 Labor Relations Officer 3

The Union called the following individuals:

Dale Cooper, Grievant - Facility Maintenance Specialist 2
Lyndon Baxter- Steward
Andrea Woods- Steward
Derek Urban - OCSEA Staff Representative

The parties agreed to submit closing statements via email by the close of business on January 4, 2024. They later extended the submission date until January 8, 2024, at which time the record was closed.

PERTINENT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT AND POLICY

ARTICLE 9 – OHIO EMPLOYEE ASSISTANCE PROGRAM is incorporated herein as if fully rewritten.

9.04 - Employee Participation in Ohio EAP

- A. Records regarding treatment and participation in the Ohio EAP shall be confidential. No records shall be maintained in the employee's personnel file except those that relate to the job or are provided for in Article 23. In cases where the employee and the Employer have entered into a voluntary EAP Participation Agreement in which the Employer agrees to defer discipline as a result of employee participation in the Ohio EAP treatment program, the employee shall be required to sign appropriate releases of information to the extent required to enable the Ohio EAP staff to provide the Employer with reports regarding compliance or noncompliance with the Ohio EAP treatment program.
- B. If an employee has exhausted all available leave and requests time off to have an initial appointment with a community agency, the Agency shall provide such time off without pay.
- C. The Employer or its representative shall not direct an employee to participate in the Ohio EAP. Such participation shall be strictly voluntary.
- D. Seeking and/or accepting assistance to alleviate an alcohol, other drug, behavioral or emotional problem will not in and of itself jeopardize an employee's job security or consideration for advancement.

ARTICLE 24 – DISCIPLINE is incorporated herein as if fully rewritten.

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...

Section 24.02 - Progressive Discipline The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- a. One (1) or more written reprimand(s);
- b. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

- c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;
- d. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

24.04 - Investigatory Interview An employee shall be entitled to the presence of a Union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her. When employees have a right to and have requested a steward, stewards shall have the right to be informed of the purpose of the interview and to receive a copy of any documents the Employer gives to an employee to keep, during an investigatory meeting. Employees who are interviewed or testify during an investigation have no right to a private attorney, Ohio Revised Code 9.84, notwithstanding.

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 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.

24.06 - Imposition of Discipline The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

Article 35 Disability Benefits is incorporated herein as if fully rewritten.

35.01- Disability Program (H)

H. In the event an employee submits an application for disability leave after either: 1) the employee has received notice that he/she is under investigation for possible disciplinary action; or 2) where an investigation regarding the employee is actively underway, disability payments may be held in abeyance subject to the following procedure: The Agency shall promptly notify DAS that: 1) an investigation is underway; 2) the date that the investigation was initiated; 3) the basis of the investigation; and 4) why access to the employee is necessary for completion of the investigation. A copy of the disability leave application and all accompanying documentation shall be forwarded with the notification. In the event that DAS concurs that

the disability payments should be held in abeyance, DAS shall notify the employee, by regular and certified mail, that the disability payments shall not be processed until the completion of the investigation. An investigatory interview pursuant to Article 24, Section 24.04 of the Collective Bargaining Agreement shall be scheduled no more than thirty (30) days after the Agency files the investigation for possible discipline with DAS. The matter shall then be subject to the constraints of Article 24 of the Collective Bargaining Agreement. Upon completion of the investigatory interview, or the thirty (30) day period, payments may be made, providing the application qualifies for eligibility. However, if the investigation cannot be completed as a result of the employee's absence, the investigatory interview shall be cancelled and the application shall be denied. Said denial shall not prevent the submission of a new application, subject to the above same requirements. This Section shall not be applicable where the absence, and subsequent disability, is the result of hospitalization for more than five (5) days for a serious medical condition. If an application for disability benefits is pending and/or has been approved prior to the initiation of the investigation, this Section shall not be applicable.

ODOT Work Rule Policy 17-015(P) is incorporated herein as if fully rewritten. Policy Statement: To provide all employees with a clear understanding of ODOT's general code of conduct and to standardize the rules of employee conduct so that they are applied fairly and understood by all employees and to ensure adequate forewarning of the potential consequences of violation.

Scope:

ODOT is dedicated to the policy of progressive constructive discipline. Disciplinary actions should be imposed at the lowest level possible with the intent of giving the employee the opportunity to correct his/her behavior so long as the discipline is commensurate with the infraction. If this does not occur, discipline should become more severe up to and including infraction. If this does not occur, discipline should become more severe up to and including removal. Certain offenses by their nature warrant severe disciplinary action on the first offense.

4. Failure of Good Behavior

- C. Insolence - Rude or Disrespectful Conduct
 - I. Any act that may discredit, embarrass, undermine or interfere with the mission of the Agency, including but not limited to, that appearing on social media.

STATEMENT OF FACTS:

The Department employed the Grievant as a Facility Maintenance Specialist 2. In this role, the Grievant is responsible for addressing work order requests related to electrical, plumbing, carpentry, and other facility-related issues requiring repair. While his forte is in electrical work, the Grievant is proficient in a variety of maintenance tasks and is capable of handling diverse repair needs within the facility.

ODOT has partnered with STAR for an extensive period. STAR was established in 1972 with the primary mission of offering support to adults with developmental disabilities. This mission is executed through three main avenues: adult services, transportation, and vocational programs. A crucial aspect of STAR's mission is its commitment to facilitating employment opportunities for individuals with disabilities. The vocational program specifically offers training and employment opportunities to individuals. STAR's workforce spans five counties and is engaged in various tasks including garage maintenance, rest area upkeep, outpost management, and grass mowing across different locations. There is no jointly sponsored training between ODOT and STAR regarding developmentally disabled adults. There is no evidence of record of any employer sponsored training regarding developmentally disabled adults.

The CEO of Star, Inc., raised concerns about the conduct of the Grievant following interactions with Star staff members at the Scioto County Rest Area District 9 Facility on July 22, 2022, and again on July 26, 2022 to the Facility Administrator. On July 22, 2022, at the Scioto County SR23 rest area, the Grievant engaged in a conversation with a young individual named Brandon, who is approximately 30 years old and has been part of the STAR program since 2016. During this interaction, the Grievant advised Brandon, who is developmentally delayed, not to forget his "soap on the rope" when

Brandon informed the Grievant that he was starting a new job at the prison. This remark was made in the presence of another individual with developmental disabilities, and another Star employee who intervened, expressing concern that Brandon might not comprehend the comment due to his disability. Although she did not formally report the incident, she did inform the Grievant that his comment was inappropriate, to which ended the conversation. The Grievant admitted to making the remark but asserts that the remark was intended as a joke rather than being derogatory in nature.

Minzelli, an employee at the Star Workshop, reported an incident that occurred on July 26, 2022, while he was working at the rest area. At approximately 8:30 AM, the Grievant arrived, asked how things were going, and informed the STAR crew of two about some trash that needed to be picked up in the parking lot. Additionally, Minzelli mentioned to the Grievant the sink in the women's bathroom was clogged. According to Minzelli, the Grievant in response commented that he would inform John and Jamie about the issues, but expressed doubt regarding their promptness in addressing them.

Later in the day, around 12:30 PM, the Grievant returned to the facility and entered the room abruptly, accusing Minzelli and his coworker of neglecting their duties. The Grievant informed the two-person crew that he intended to take photographs of the job site and send them to his supervisor. In response, Minzelli explained to the Grievant that they would address the tasks as soon as possible, noting the current high volume of individuals and vehicles at the site. The other crew member was Brandon from the July 22nd incident. The Grievant also told Brandon to "remember don't forget your soap on the rope."

Unbeknownst to the Grievant, Brandon is reported as being high on the autism spectrum and can be very sensitive to criticism. Brandon was

upset and anxious and fixated about potential repercussions and losing his jobs throughout the remainder of the workday.

The Grievant emailed the Facility Program Administrator his concerns and attached the photos which he took at the scene. The email indicates that it was sent on Tuesday, July 26, 2022 at 2:00 pm. The email documents the Grievant's actions and interaction with Minzelli, and concludes with saying "that someone probably needs to have a conversation with the STAR company to make sure our facilities get the care and attention they are contracted to do." Minzelli also took photos at the end of the day to demonstrate that he and his coworker had completed their assigned tasks.

On Tuesday, July 26, 2022 at 2:44 pm, the Facility Program Manager emailed the Labor Relations Officer because he received a telephone call complaint by the STAR CEO regarding the Grievance's conduct.

The Grievant's last day of work was approximately on July 28, 2022. Grievant had scheduled an appointment with his general practitioner on August 1, 2022, seeking treatment for stress, elevated blood pressure, and anxiety believed to be related to his working conditions. On August 4, 2022, the Grievant submitted disability paperwork to his physician for completion. This paperwork was then filled out by the physician and faxed to the Department on August 11, 2022. The Grievant's medical providers, placed the Grievant on immediate leave from work.

The ODOT investigator received the complaint for investigation towards the conclusion of July 2022. He subsequently scheduled an interview with the Grievant for August 11, 2022, at the district headquarters. Upon arriving at District Headquarters, the ODOT investigator received a voicemail from the OCSEA staff representative. The voicemail stated,

Hi, Jeff, this is Derek urban. Staff rep with those CSDA. I'm the staff rep for Dale Cooper, who has/was scheduled for an investigatory interview today. Dale has called off today he's off on. He said he's off on short term disability. I don't know. But I know he's used sick leave for today. So I'm not certain

why we're having a investigatory interview on a day when he used sick leave. And that's not coming to question. So I'd like to know what exactly is going on. on your end, I talked to Neil, and you know, he said that you had work this out directly with Dale. But Dale texted me that he doesn't want to go in he, he has called off. And so you know, if I'm not sure what the urgency is here, I mean, if he comes back to work, you guys can do it. If he goes on disabilities, and you have that avenue, and the contract is to have the interview. But I don't think it's proper to do that today. And have him come in when he called off sick. If you can call me back, and we can have that conversation. I would appreciate it. I know this is coming close to time at 10 o'clock. But we've to get that taken care of things. (May not be verbatim)

The Grievant did not appear for the investigation or contact the investigator. The ODOT-investigator did return the telephone call to the OCSEA representative. The particulars of which were not disclosed at the arbitration hearing but it was understood the investigation would not occur on that day. The Agency did not reach out to the Grievant again until February 3, 2023, to arrange for the rescheduling of the investigation, now set for February 7, 2023. The ODOT-investigator explained that DAS had not given him permission to reschedule the investigatory interview until January 30, 2023. The Union points to the email correspondence of DAS seeking clarification why the investigation has not been completed when they received notification of discipline as of August 12, 2022. The investigation was then scheduled and took place on February 7, 2023. The Grievant attended with his OCSEA representative.

By letter dated April 4, 2023, Management notified the Grievant that the Agency was considering taking action against him based on allegations his actions on July 22, 2022 and July 26, 2022. According to the letter, Grievant made derogatory comments about his coworkers and supervisors to the contract staff, and his comments were not only demeaning to the contractor, they brought discredit and embarrassment. Management conducted a pre- disciplinary hearing on April 12, 2023. The pre-disciplinary

hearing officer found just cause for discipline on April 14, 2023. By letter dated April 17, 2023, the Department terminated the Grievant from employment as a Facility Maintenance Specialist, assigned to ODOT District 9 due to the alleged violation of Policy 17-015(P), items: 4C: Insolence-rude or disrespectful conduct and 4I: Any act that may discredit, embarrass, undermine or interfere with the mission of the Agency, including, but not limited to, that appearing on social media.

The Grievant had served approximately seven years with ODOT. At the time of termination, the Grievant had accumulated a one-day working suspension, a two-day working suspension, and a four-day working suspension. Notably, the four-day suspension was for insolence or disrespectful conduct. Review of the Employment Opportunity Center (EOC) confirms no disciplinary actions were recorded prior to December 20, 2021.

Position of the Agency

The Agency contends there was just cause for discipline. The Agency argues that the discipline was timely. The Agency asserts the Grievant admitted to confronting the STAR employees about the trash that needed to be picked up, throwing weeds down on the sidewalk in front of the employees, and telling a STAR employee that he was going to need "soap on a rope" when he goes to work at the prison on two separate occasions. Furthermore, the Agency contends that the Grievant was familiar with the established regulations and had recently faced disciplinary action for violating Rule 4C, which pertains to insolent, rude, or disrespectful behavior. Given the Grievant's employment history, the Agency maintains that termination is the appropriate course of action in accordance with the progression of disciplinary measures.

The Agency contends that disciplinary measures were enacted in a timely manner, despite the Union's efforts to discredit the investigation by alleging untimeliness. The Agency maintains that evidence shows the investigator made prompt attempts to proceed shortly after the incident, but the OCSEA representative representing the Grievant postponed the interview. This claim is supported by testimony from the investigator and a recorded conversation where the OCSEA representative mentioned the Grievant's disability application. The Union's attempts to undermine the investigation are unfounded, particularly their assertion that Article 35.01 imposes a 30-day deadline for completing the investigation, which, according to Management, is not applicable to the discipline process. Management also points out Article 24, which governs the timeline for investigation and discipline procedures, stating that the Agency fulfilled its obligation by issuing discipline within sixty (60) days of the pre-disciplinary meeting.

The Agency further contends the Grievant's conduct breached the trust placed in him by the public while discharging his professional duties. The Agency argues the Grievant had a clear obligation to uphold professionalism and refrain from exploiting his position for personal gratification. Despite the absence of any mandate to engage with STAR employees, the Grievant resorted to bullying tactics against the caretakers, notably by rudely

discarding weeds in their presence. According to the Agency, such behavior was profoundly disrespectful and degrading to the caretakers. It is distressing that Brandon, the primary target of the Grievant's actions, would soon start working at the prison. The unwarranted comments directed at him, compounded by his developmental disabilities, are wholly inappropriate for any workplace setting. The Agency concludes the record establishes a consistent pattern of bullying and intimidation by the Grievant, including towards individuals with developmental disabilities.

The Agency firmly contends that these incidents cannot be dismissed as harmless banter or shoptalk. Instead, the Agency argues that the Grievant's behavior constitutes clear instances of intimidation and psychological abuse, particularly towards someone as vulnerable as Brandon, who has developmental disabilities. Despite repeated instances of the "soap on a rope" comment, the Grievant refused to provide a satisfactory explanation, suggesting an intentional use of power. The Agency argues that such conduct cannot be dismissed as harmless, and given the Grievant's inability to control aggression, his return to work is untenable and would damage the organization's reputation. Therefore, they request that the grievance be denied and the termination upheld for just cause.

Lastly, the Agency contends that Management has employed progressive discipline measures without success. The Agency argues that a discernible pattern of inappropriate behavior has emerged, notably in the form of intimidation, bullying, and inability to work alongside others in a professional manner. It is the position of the Agency that reinstatement would be highly inappropriate and would only tarnish the reputation of District #9 and the Ohio Department of Transportation even further. The Agency requests this grievance to be denied in its entirety.

Position of the Union

The Union argues that the Agency lacked sufficient cause to terminate the Grievant. Management's witnesses attempted to undermine the Grievant's credibility by alleging he demeaned STAR employee Brandon, referring to him as a "kid." However, when pressed, the ODOT investigator conceded there was no evidence the Grievant directly addressed Brandon in such a manner. Additionally, the Facility Administrator claimed the Grievant had previously mistreated rest area staff, yet admitted under cross-examination that no documentation or prior disciplinary action supported these claims. The Union contends that while the Grievant admitted to commenting "soap on the rope," it was meant as a benign gesture of good luck to Brandon, not intended to disparage. They argue this was shoptalk in their line of work. Furthermore, the Grievant testified that his interaction with the rest area staff addressed maintenance issues to uphold public presentation standards. Despite Management's insistence on the Grievant's inappropriate behavior, the Union maintains that his actions were not malicious but focused on ensuring the facility's upkeep. Union claims the Agency failed to establish a violation.

The Union contends that Management fostered a hostile work environment, causing increased anxiety and stress for the Grievant. They cite instances where the Grievant was made to work alone on projects typically requiring two employees, despite requests for assistance after sustaining injuries on the job, receiving separate instructions from colleagues, and being excluded from team activities. The Grievant's notes from May 2022 to July 2022, submitted as Exhibit, highlight disparities in treatment. The Union points to specific incidents, including Management's derogatory comments in front of multiple employees and the Grievant being isolated while others worked together. They assert that before the June 2022 incident, the Agency sought to terminate the Grievant. For these reasons, the Agency denied the Grievant the right to participate in the EAP.

The Union asserts that Management's failure to promptly investigate prejudiced the Grievant. Despite Management's claim that they awaited approval from the Department of Administrative Services (DAS) due to the

Grievant's disability claim, the Union argues this excuse is unfounded under CBA Article 24.04. Evidence shows the Union contacted Management on August 11 to express concerns about interviewing the Grievant on the scheduled date. Still, Management delayed rescheduling until February 3, 2023, causing a six-month delay. According to the Union, this lack of timeliness deprived the Grievant of a fair defense.

The Union contends the penalty is not commensurate with the offense. The Union asserts that the primary purpose of disciplinary measures is corrective action rather than punishment alone. Highlighting Article 24.02's provision for progressive discipline, the Union emphasizes the Grievant's prior disciplinary history only included a medium-level suspension, not termination. Despite three distinct offenses within the same timeframe, the Union maintains that each offense should be addressed separately within the framework of progressive discipline. Furthermore, the Union argues that the alleged offenses are minor and do not warrant termination. The Union questions the appropriateness of such severe consequences for what it deems as innocuous behavior. Even if some discipline is warranted, the Union suggests a 5-day suspension would have been more fitting, especially considering the Grievant's clean disciplinary record until December 2021. In support of its position, the Union references a previous arbitration decision involving a similar situation where a lesser penalty was imposed.

Lastly, the Union seeks the Grievant's reinstatement with reinstated back pay, benefits, seniority credits, and leave balances. Additionally, they request reimbursement for union dues, any other necessary remedies, and his participation in the Employee Assistance Program (EAP).

Discussion

The threshold question is whether the Employer timely conducted its investigation and initiated disciplinary proceedings. The Employer asserts the discipline was issued within sixty (60) days of the pre-disciplinary meeting, resulting in timely discipline pursuant to Article 24.06. According to the Union, an arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process pursuant to Article 24.02.

The basic details of this case are largely undisputed. The incidents leading to disciplinary action occurred on July 22 and July 26, 2022. The Facility Program Administrator referred the incident for discipline. The incident was referred to the ODOT investigator, who scheduled an investigatory interview on August 11, 2022. However, at the request of the OCSEA representative, the interview was postponed due to the Grievant's absence due to sick leave. Subsequently, the investigatory interview was not rescheduled until February 7, 2023. The ODOT investigator explained that he was "waiting on permission from DAS to reschedule the interview."

According to the investigator, the OCSEA staff refused to attend. While it is true the OCSEA representative canceled the initially scheduled hearing, the investigator did not make any efforts to reschedule the meeting. There is no evidence that the OCSEA representative declined to attend any subsequent interview. The voice message indicates a request for further discussions regarding contractual options, and the ensuing conversation confirmed the cancellation of the meeting for that day and the need to abide by the contract.

The disciplinary procedure outlined in this Collective Bargaining Agreement (CBA) commences with the investigatory interview, as specified in Section 24.04. Section 24.04 does not prescribe any specific time

constraints for this interview. However, the Union contends that the timing of disciplinary actions is crucial, arguing that any delay beyond a certain point renders the discipline void, rendering any decision on its merits moot. The Union cites Article 35.01(H) to support its position that the investigatory interview should have been completed within thirty (30) days. In this case, the evidence reveals the investigatory interview took place almost six months later than initially scheduled. Article 35.01 (H) reads in pertinent part:

In the event that DAS concurs that the disability payments should be held in abeyance, DAS shall notify the employee, by regular and certified mail, that the disability payments shall not be processed until the completion of the investigation. An investigatory interview pursuant to Article 24, Section 24.04 of the Collective Bargaining Agreement shall be scheduled no more than thirty (30) days after the Agency files the investigation for possible discipline with DAS. The matter shall then be subject to the constraints of Article 24 of the Collective Bargaining Agreement. Upon completion of the investigatory interview, or the thirty (30) day period, payments may be made, providing the application qualifies for eligibility.

It is a fundamental principle that contracts should be interpreted in their entirety to ascertain the intent of the parties involved. However, the timeline of Article 35.01(H) is only imposed in the event that DAS concurs the disability payments should be held in abeyance and the matter shall then be subject to the constraints of Article 24 of the Collective Bargaining Agreement. This was not applicable in this grievance.

Upon review of the evidence and an examination of the language used in both articles, it becomes apparent that Article 35.01 primarily pertains to the disbursement of disability benefits and does not directly impact Article 24 and the discipline process unless DAS concurs that disability payments should be held in abeyance.

However, without explicit time constraints, general arbitral principles typically defer to a reasonableness standard. In this context, the CBA stipulates that disciplinary measures must be initiated promptly, emphasizing the importance of timely action and aligning with the overarching requirements outlined in other provisions of the same Article. Considering the evidence presented, the delay in rescheduling this investigation cannot be ignored. Nothing in Article 24 states that approval from DAS is necessary to schedule an investigatory interview. This Arbitrator concludes that the parties intended for prompt determination of whether to issue discipline in a manner that affords due process safeguards to the employee. A prompt investigation and issuance of discipline ensure that evidence and testimony are preserved while memories are fresh, and, more importantly, suspensions pending investigation and decision to assess discipline are not held in perpetuity.

However, my examination does not stop there; ultimately, the Union must demonstrate that the delay had a detrimental impact or prejudice on the Grievant. In this case, the Grievant confessed to the behavior, which involved remarking, "Don't forget the soap on the rope," while addressing the STAR crew about their assigned tasks of picking up trash in the parking lot and weeding the flowerbeds. Additionally, the Grievant informed the crew that he intended to photograph the area's condition and report it to his supervisor. With an acknowledgment of the conduct, prejudice is deemed absent. Thus, a consideration of the merits is warranted.

Article 24.01 of the CBA states that disciplinary action cannot be imposed on an employee without just cause. When determining whether "Just Cause" exists for disciplinary action, Arbitrators typically consider factors such as proven misconduct, the severity of the offense, the employee's past performance and disciplinary history, whether the employee was given adequate notice of expectations and consequences, the disparity

in treatment, and whether the corrective action taken was proportionate to the offense. The Agency terminated the Grievant for violation of Policy 17-015(P), items: 4C -Insolence- rude or disrespectful conduct and 4I, any act that may discredit, embarrass, undermine or interfere with the mission of the Agency, including but not limited to, that appearing on social media.

Grievant admits to twice remarking, "Don't forget your soap on the rope." The Grievant stated that he made the remark jokingly but did not understand its meaning. This Arbitrator does not find his testimony credible. Every other witness who testified had a common understanding of the phrase. The phrase plays on the stereotype or fear of potential sexual harassment or assault in correctional facilities. The phrase is a crude, humorous, or sarcastic way of reminding a new employee to be mindful of personal safety and security, suggesting that dropping the soap in a prison shower could lead to an uncomfortable or risky situation due to the proximity of other inmates. Depending on the audience, the comment can be interpreted as crude, sarcastic, or humorous. The remark should not been said but does not warrant termination.

STAR employee Minzelli testified that Grievant alluded to the poor work ethics of his colleagues to STAR employees. The other crew member did not make a similar statement to corroborate his testimony. The Grievant denied the same. This Arbitrator finds insufficient evidence to support any alleged violation of the Policy.

The Grievant has acknowledged engaging in discussions with STAR employees regarding their job performance. He justified his actions by citing instructions from his supervisors, who allegedly tasked him with observing these work areas and providing feedback. Additionally, he claims to have previously submitted photos to management highlighting concerns at various job sites. However, the Facilities Program Administrator testified the Grievant has been subject to multiple coaching sessions in the past. As a result of

In these incidents, the Grievant was explicitly directed to maintain a cordial demeanor toward STAR employees. Despite this directive, the recent confrontation with STAR employees marked a significant escalation, prompting management to initiate disciplinary action. It is important to note the Grievant did not hold any supervisory authority over STAR employees, and the directive explicitly prohibits him from engaging with them regarding work performance. His behavior during the afternoon visit at the facility is found to be discourteous and a violation of Policy 17-015(P), specifically Failure of Good Behavior Rule 4-C. The Grievant was not charged with failure to follow a directive, so the morning visit was not considered; the escalation of behavior and lack of professionalism occurred during the afternoon visit.

Rule 4 I governs any action that may discredit, embarrass, undermine, or interfere with the mission of the Agency, including but not limited to that appearing on social media. In practical terms, this rule ensures that employees conduct themselves in a manner that upholds the Agency's standards and values, both within and outside the workplace. None of his behaviors constitute actions that may discredit, embarrass, undermine, or interfere with the mission of the Agency, including but not limited to that appearing on social media but are more reflective of his character.

The Agency removed the Grievant from his position. This Arbitrator finds the penalty excessive, considering the totality of the circumstances and the nature of the offense. This Arbitrator opines that the nature of this offense is not a severe or major infraction. The Agency asserts the severity of the offense should be heightened because the comments were aimed at a developmentally disabled child. This child was notably distressed by the confrontation and expressed fears of losing their job due to the reported condition of the job site. However, it is noteworthy the Agency is a long-term partner with STAR but does not provide any specific training for its employees on how to effectively and sensitively interact with individuals with

developmental disabilities. This lack of training raises concerns about the Agency's ability to address such situations appropriately. It underscores the importance of implementing comprehensive training programs to foster inclusive and respectful workplace interactions.

The Grievant is a seven-year employee with the Agency with no disciplinary record until December of 2021. The first occurrence resulted in a one-day working suspension, served on December 15, 2021, for misusing state equipment, vehicles, or property and making intentional statements, actions, or omissions intended to mislead others. The second incident led to a two-day working suspension, served on April 14, 2022, for failure to follow district or office management's policies, directives, or procedures. The third occurrence resulted in a four-day working suspension, served on June 9, 2022, for insolence or rude/disrespectful conduct. Under the policy grid, none of these penalties are deemed a serious violation of the standards of the conduct. Progression also factors in time for rehabilitation to identify and correct behaviors.

Section 24.02 (Progressive Discipline) of the parties' Collective Bargaining Agreement states disciplinary measures must correspond with the severity of the offense committed. Disciplinary actions may include one or more suspensions, allowing the suspension to be repeated. This Arbitrator concludes a 4-day suspension is commensurate with this behavior.

AWARD

After carefully considering the testimony, exhibits, and arguments, this Arbitrator partially sustains the grievance. The Agency has met its burden. The Grievant was discourteous in violation of 4C-Insolence-Rude or Discourteous Conduct, and a 4-day suspension is imposed. The Grievant is reinstated with seniority, health insurance, leave balances, other benefits restored, and reimbursement for union dues. No back pay is awarded due to

the Grievant's ineligibility to work due to his physician's orders. If the Grievant was released to return to work during this termination period and obtained employment, the Grievant would be entitled to back pay from that period, and his backpay should be offset against the wages. The Grievant is directed to volunteer to participate in the EAP program. The Agency should also offer the Grievant, and the Grievant shall complete sensitivity training to enhance his awareness and understanding of interpersonal dynamics and respectful communication.

February 26, 2024

Meeta A. Bass

Arbitrator Meeta A. Bass

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of this Opinion and Award was served on the following individuals this 26th day of February, 2024:

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