Susan Grody Ruben, Esq.
Labor Arbitrator
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ARBITRATION PROCEEDING PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME LOCAL 11/AFL-CIO

and

THE TRUMBULL COUNTY ENGINEER

FMCS CASE NO. 15-56038-6

GRIEVANT: Anthony Johnson

Arbitrator's Opinion and Award

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME LOCAL 11/AFL-CIO ("the Union") and THE TRUMBULL COUNTY ENGINEER ("the County") under which Susan Grody Ruben was appointed to serve as sole, impartial Arbitrator. Her Award shall be final and binding pursuant to the Agreement. The Parties

stipulated there are no procedural impediments to a final and binding Award.

Hearing was held December 28, 2015. Both Parties had representatives who had full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make argument. Both Parties filed post-hearing briefs.

APPEARANCES:

On behalf of the Union:

George Yerkes, Staff Representative, OCSEA, Westerville, OH.

On behalf of the County:

Matthew J. Blair, Esq., Blair & Latell Co., L.P.A., Niles, OH.

STIPULATED ISSUE

Whether the 30-day work suspension imposed against union employee Anthony Johnson was imposed with just cause, and if the 30-day work suspension was not warranted, what would be the proper remedy?

RELEVANT SECTIONS OF THE AGREEMENT

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Article 6: Corrective Action

Section 1. Disciplinary action shall not be imposed upon an employee except for just cause and until the employee has exhausted his/her grievance procedure rights through Step 2. The Employer has the burden to establish just cause for any disciplinary action.

Section 2. Disciplinary action shall generally be applied in a progressive manner commencing with a verbal reprimand, written reprimand, suspension(s) without pay and discharge from employment. However, the severity of discipline may be increased or decreased on a case by case basis depending upon the nature and seriousness of the offense and the employee's past record of discipline and performance. It is also recognized and understood that certain offenses are serious enough to warrant discharge without regard to previous reprimands and discipline.

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Article 9: Grievance Procedure

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Section 7. Arbitration

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The Arbitrator shall act in a judicial, not legislative capacity and shall have no right to recommend to amend, modify, nullify, ignore, add to, nor subtract from the provisions of this Agreement. He or she shall only consider and make a decision with respect to the specific issue submitted

and shall have no authority to make a decision on any other issue not submitted to him or her. In the event the arbitrator finds a violation of the terms of this Agreement, he or she will fashion an appropriate remedy.

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FACTS

The Grievant has been employed by the County for approximately 16 years. On October 3, 2014, he was involved in a fuel spill while fueling County equipment. The Grievant's October 7, 2014 written statement regarding the incident states:

> On Friday Oct 3rd around 7:30 [am] I was filling up my truck 365 with diesel, when I started pumping I walked away from the pump, when I got back to the pump I noticed that the fuel was leaking out. I quickly shut off the pump and put down the absorbers on the spilled fuel. Then I walked over to my Supervisor Tim Monroe and let him know what happened. The automatic pump shut off was not working.

Supervisor Timothy Monroe's October 3, 2014 written statement regarding the incident states:

> On Friday morning, October 3, 2014 at approximately 7:45 A.M. – 8:00 A.M., as I was entering information into the fueling station, Tony Johnson told me that the auto shut-off for diesel pump #2 was malfunctioning and a small amount of diesel fuel had spilled under the truck that he was fueling. He was in the process of placing spill absorbent pads on the area when he

told me. Since it did not appear to be much fuel spilled, I assumed the pads and some oil dri would be sufficient. I told him I would notify Walt Emerick about the fuel pump nozzle not working, but got busy with some other matters and forgot to do so.

The October 27, 2014 Pre-Disciplinary Hearing Notice provides in pertinent part:

> ...you are charged with violation of the following work rules:
>
> 1. Neglect of duty; Category 1 – Failure to follow workplace safety rules
>
> Category 4 – Leaving worksite in an unsafe manner
>
> 2. Misfeasance, malfeasance, nonfeasance;
>
> Category 2 – Any act indicating negligence toward the job or county property
>
> Category 2 – Any act indicating an irresponsible attitude, etc.
>
> The basis of the charge is as follows:
>
> On October 3, 2014, you caused a fuel spill due to negligence and failed to properly clean up the spill. This is a violation of the Trumbull County Engineer's policy manual, safety training, workplace rules and regulations, and environmental guidelines.
>
> ...

The suspension letter provides in pertinent part:

> ...
>
> After carefully considering the facts, your previous work record, and the recommendation of the hearing officer, this letter is to inform you that your actions have resulted in my decision to suspend you for thirty (30) days without pay. Your suspension will begin Wednesday, November 5, 2014 and conclude Thursday, December 4, 2014.[1]
>
> ...

The grievance alleges:

> Trumbull County Engineer did administer a thirty day suspension on Anthony Johnson without just cause.

The grievance seeks the following remedy:

> Make whole all monies and benefits, reinstate Anthony Johnson to full time employment immediately and expunge said reprimand from his file.

[1] The suspension ultimately was served from November 19, 2014 through December 18, 2014.

POSITIONS OF THE PARTIES

County Position

City of Piqua v. FOP, Ohio Labor Council, 183 Ohio App. 3d 495 (2009) synthesizes the "Daugherty" "seven tests of just cause"[2] into a two-part test:

(1) whether a cause for discipline exists; and

(2) whether the amount of discipline was proper under the circumstances.

See also Summit Cty. Children Servs. Bd. v. Communication Workers of Am., Local 4546, 113 Ohio App. 3d 495 (2009).

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[2] Enterprise Wire Co., 46 LA 359 (1966):

1. Was the employee forewarned of the consequences of his or her action?
2. Are the employer's rules reasonably related to business efficiency and performance the employer might reasonably expect from the employee?
3. Was an effort made before discipline or discharge to determine whether the employee was guilty as charged?
4. Was the investigation conducted fairly and objectively?
5. Did the employer obtain substantial evidence of the employee's guilt?
6. Were the rules applied fairly and without discrimination?
7. Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?

The Grievant was negligent in leaving his County vehicle unattended during fueling. The bright yellow caution sign with red lettering on the fuel dispenser telling employees not to leave their vehicle during fueling even if using the auto latch makes such a conclusion unavoidable. Moreover, the Grievant could have avoided the incident altogether if he had asked the passenger in his truck to get out of the truck to watch the roller which was sitting on a trailer behind the truck.

The Union contends the spill was not large, that the Grievant and others took steps to clean the spill, and that the Grievant reported the spill to his supervisor. The videotape, however, speaks for itself regarding the Grievant's negligence in causing the spill. The videotape also shows the size of the spill and that the Grievant did not take appropriate steps to properly abate the spill.

The Grievant was given notice of the consequences of his action through various safety memos, including monthly safety topic reminders. Further notice was provided by the yellow sign on the fuel pump. The County's rules for fueling a vehicle safely are clearly related to business efficiency, safety, and performance. The County had a right to expect the Grievant to follow proper procedure when fueling his vehicle. The County,

by reviewing the videotape and ordering an independent investigation by Crash Tech, was able to determine the Grievant was guilty as charged. Independent investigator Crash Tech conducted the investigation fairly. The 30-day suspension was reasonably warranted, given the seriousness of the Grievant's offense and his past discipline record.

Although the Grievant contends he attempted to clean up the spill with the materials on hand at the pump, the videotape shows the Grievant did not do anything other than quickly throwing some absorbent mats down before leaving the scene. The Grievant's reporting of the spill was also less than truthful. The Grievant reported a "small spill" to his supervisor, Timothy Monroe.[3] But supervisor William Sparks, who prepared the Spill Release Incident Reporting Form, testified the spill was the largest he has seen while at the Engineer's Office.

The Grievant did not follow training he had received regarding spills.[4] He did not place dry sweep on the spill.

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[3] Supervisor Timothy Monroe no longer works at the Engineer's Office and did not testify at the hearing.

[4] The transcript of the training video the Grievant admittedly viewed included:

> ...always stay with your vehicle...for the entire filling operation. Don't walk away while fueling. Stay there to make sure that everything goes into the tank and not onto the pavement....

The Grievant was found guilty of a Category 4 offense – leaving worksite in an unsafe manner -- due to the fact that he left the fueling station in an unsafe manner. Leaving a spill of a flammable fluid of this size unattended could have reasonably posed a serious health threat not only to his fellow employees but also the employees of the numerous townships and County agencies that frequent the Trumbull County Engineer's Office. A 30-day suspension is the minimum discipline for a Category 4 first offense in the Discipline Matrix.

The Grievant's conduct of leaving his County vehicle while fueling and walking to his personal vehicle 250 feet away demonstrates not only negligence toward his job, but also negligence toward County property. The Grievant had a duty to remain with his County vehicle while it was being fueled. He breached that duty. As a direct and proximate result of his negligence, a large diesel fuel spill occurred, necessitating a visit from the Warren Fire Department, as well as a cleanup of the spill by County

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...If a leak occurs, stop the leak and contain the spill. Use dry cleanup methods like sweeping up granular materials or for liquids, spreading absorbents and then sweeping. Never hose down a spill. If the spill is hazardous or beyond the capability of the cleanup material available to you, or if you don't know what the spilled material is, you will have to call for help.

Engineer employees, and subsequently, the disposal of absorbent pads and material used to collect the spill.

The Grievant also had a duty to properly report and clean the spill. He breached this duty by failing to properly abate the spill and by improperly describing the spill as "small" to his supervisor. The Grievant was found guilty of a Category 2 offense – Any act indicating negligence toward the job or County Property. The Grievant was also found guilty of another Category 2 offense – Any act indicating an irresponsible attitude. The Grievant's prior discipline included two Category 2 offenses. Applying the Disciplinary Matrix, the 30-day suspension was justified given that the matrix provides for a sentence between 10 days to removal for a third Category 2 offense.

The Crash Tech independent investigation report conclusion provides in pertinent part:

> The fuel spill...was a result of Employee Johnson failing to comply with the multiple rules, regulations, and laws regarding the fueling of vehicles. These rules, regulations, and laws include Trumbull County Engineer's Office Memos and directives from supervisors and the Safety Office, the Ohio Revised Code 3741.14, and the labeled directions on the pumps.

> Immediately following the fuel spill, proper procedures were not followed regarding the clean-up and containment of the spill. According to the Environmental Protection Agency guidelines, oil dry or dry sweep should have been placed on the fuel spill and then swept up immediately. Also considering the magnitude of the spill, insufficient amounts of absorbent material was applied....

The Grievant's prior discipline consists of:

1. Written reprimand for 12/21/12 misfeasance, malfeasance and nonfeasance

2. 3-day suspension for 2/5/13 misfeasance, malfeasance and nonfeasance

3. 3-day suspension for 6/23/14 malfeasance

The 30-day suspension was not only justified, it was lenient given the seriousness of the incident. The 30-day suspension was fairly applied without any discrimination, as it was the lowest suspension available in the matrix for a Category 4 offense. The 30-day suspension was also within the parameters available for Category 2 offenses, given the Grievant's prior discipline record.

The County has demonstrated just cause to discipline the Grievant for Neglect of Duty and Misfeasance, Malfeasance, Nonfeasance. The record satisfies the seven prongs of the Daugherty Test, as well as the two

prongs of the City of Piqua analysis. Accordingly, the Grievant's 30-day suspension must be sustained.

Union Position

The suspension was without just cause. It was issued purely for retribution. The County has failed to show the Grievant was negligent or that he failed to clean up the spill. Walking away from fueling with the auto latch engaged is not negligent. The Grievant cleaned up the spill to the best of his ability. The Grievant's supervisor on the scene thought so much of the spill that he did not remember to report it.

The Grievant was issued a written reprimand on December 21, 2012. The terms Misfeasance, Malfeasance, and Nonfeasance are used without any explanation. Further, the grid would have called for at least a 3-day suspension, but the County chose to discipline below the grid.

The Grievant was issued a 3-day suspension on February 26, 2013, again for Misfeasance, Malfeasance, or Nonfeasance. This being the Grievant's second offense, he should have received at least a 30-day suspension.

The Grievant was issued another 3-day suspension on July 9, 2014, again for Misfeasance, Malfeasance, or Nonfeasance. The grid called for removal, but the County settled with the Grievant and even agreed to take the discipline off his record a year early.

The Grievant received the instant 30-day suspension on November 5, 2014 for 4 separate charges. While the County contends it always follows the grid, clearly, it does not. Any notice to the Grievant of the possible penalties for the 4 charges was negated by past inconsistent application of the rules.

The County has stacked the charges. In OSCEA and State of Ohio, No. 27-17-(11-13-90) 0117-01-03 (1991), Arbitrator Rivera wrote:

> ...the Grievant was charged with both Rule 40 and Rule 46. The Arbitrator agrees with the Union that Rule 40 was, in essence, a make-weight and essentially was "stacking." Rule 46 is explicit and clear and given the allegations a proper and complete charge for this case.

Both instances of the Misfeasance, Malfeasance, or Nonfeasance rules were used purely to add weight to the discipline.

Article 6(1) states that "Disciplinary action shall not be imposed upon an employee except for just cause." Article 6(2) states that "Disciplinary

action shall generally be applied in a progressive manner." There is nothing progressive about going from a 3-day suspension to a 30-day suspension.

The record shows the Grievant did not "leave the worksite in an unsafe manner." The failure of the auto latch was an accident, no more, no less. The Grievant followed the safety rules to the best of his ability. More importantly, he left the area and went to his assigned work site at the direction of his supervisor, Tim Monroe.

When the Grievant began to fuel his County truck, he set the auto shutoff mechanism on the pump handle. This is undisputed. He then walked to his personal vehicle. The County contends there was another bargaining unit employee in the cab of the County truck that the Grievant could have asked to watch the pump. The Union contends this employee was in a perfect position to witness the Grievant walking away and to view the spill through the truck mirror. The Union questions why the County never questioned this other employee. Would not this employee have the same culpability as the Grievant if the employee saw the Grievant walking away from the pump that was fueling the truck?

The County points to the sign on the pump that states, "Never auto latch the nozzle." Employees walk by this dirty, hard to read sign every day.

There was no testimony regarding the size of the sign. The photo in the Crash Tech report could be enlarged.

The County next points to Ohio Revised Code 3741.14 which conflicts with the pump sign. The ORC section states, "persons using dispensers with hold open latches must remain at the refueling point during refueling." The Union is not certain this ORC section even applies to the pumps at the Trumbull County Engineers Office. The section appears to be referring to retail service station pumps.

The Union contends that Tim Monroe, a supervisor, was in the best position to view the Grievant fueling the County truck. While the County contends the Grievant walking away during the refueling was egregious, the supervisor did not say a word to the Grievant, did not write him up for it, and acted as though the Grievant did nothing wrong, or at least nothing out of the ordinary. Supervisor Monroe, while the Grievant was away from the County truck, walked up to a pump about 10 feet away. The video appears to show Monroe looked over at the roller being fueled by the Grievant.

The length of time the Grievant was gone from the pump does not matter because he was depending on the auto shutoff latch. The Grievant

testified that walking away from a County vehicle while fueling was a common practice for employees.

The County presented no evidence that employees could not go to their personal vehicles. No such rule was posted. The County places its whole case on a fuel pump sign that is commonly ignored.

The video shows the auto shut off mechanism failed during fueling. There was a small spill. Upon discovering the spill, the Grievant notified one of his supervisors, Tim Monroe. In Monroe's written statement, he verified the fuel pump auto shut off malfunction. He also said he would notify Walt Emrick about the malfunction. Monroe also verified it was a small spill; he wrote, "since it did not appear to be much fuel spilled." Monroe "assumed," but did not order, the Grievant to use oil dry. In the Crash Tech report, that assumption turned into an order. Monroe's written statement, along with the video, show Monroe was in full view of the Grievant when the Grievant walked away from the pump. If it is so important to stay at the pump, why didn't anyone stop the Grievant or report him?

The Grievant testified that when he reported the spill to Monroe, Monroe said to clean it up "the best you can" and "get to the worksite."

The Grievant attempted to clean up the spill with the materials on hand at the pump. He testified the spill containers were full of trash, that he had to root around the trash, and that the only thing he found in the spill containers was the absorbent pads. The Crash Tech pictures of the spill containers were taken several days after the incident.

The Grievant then went to his designated worksite. He did what his supervisor told him to do.

The Warren Fire Department responded to the spill and deemed it "small." Despite the County's efforts to characterize the spill as "large," the facts do not support that conclusion.

The record shows the Grievant did not "leave the worksite in an unsafe manner." This eliminates the Category 4 work rule violation. In any case, the Union contends the rules violations for Neglect of Duty and Misfeasance, Malfeasance, or Nonfeasance are a stacking and duplication of the charges.

There was not just cause for discipline in this case. At most, the Grievant should have received a counseling. Accidents like this fuel spill do happen in the workplace. Arguendo, if the Grievant had any culpability in this fuel spill incident, a 30-day suspension is punitive and not progressive

in nature. To uphold the discipline, the County must prove all four charges. Like the proverbial house of cards, the County's case has come crashing down.

The Union requests the Arbitrator to sustain the grievance and to order the County to do the following:

1. Remove the 30-day suspension from the Grievant's record.

2. Reimburse the Grievant for all lost wages, less appropriate deductions including union dues.

3. Reimburse the Grievant for any holiday pay or premium pay that he would have been entitled to.

4. Replenish all leave balances that would have accrued during the suspension.

5. Recalculate the Grievant's seniority to reflect no loss of seniority during the suspension.

6. Reimburse the Grievant for any overtime that he missed during the suspension.

The Union requests that the Arbitrator retain jurisdiction for 60 days.

ARBITRATOR'S OPINION

The County has the burden of proving it had just cause to suspend the Grievant for 30 days. Just cause basically consists of two elements: 1) whether the Grievant did what he is accused of doing; and 2) whether the level of discipline fits the charge. *See* City of Piqua v. FOP, Ohio Labor Council, 183 Ohio App. 3d 495 (2009).

The record shows that the Grievant left the fueling area while fueling County equipment and that he could have done a more thorough job cleaning up the diesel spill. Both of these acts are a serious breach of the Grievant's duty to perform his job responsibly. However, the Grievant's serious breach of duty is heavily mitigated by two undisputed record facts: 1) other employees have left the fueling area while fueling and have not been disciplined; and 2) the Grievant reported the diesel spill immediately to one of his supervisors and that supervisor did little or nothing with that information other than to tell the Grievant to clean up the spill and then report to his assigned worksite.

Leaving the worksite in an unsafe manner, by its own terms, can refer both to: 1) the Grievant leaving the fueling area while he was fueling

County equipment; and 2) the safety status of the oil spill area once the Grievant had performed some clean-up and left for his assigned worksite.

1. Leaving the Fueling Area While Fueling

While it is undisputed there is a posted sign on the fuel pump that states, "Never auto latch the nozzle," it is also undisputed that other employees have used the auto latch and walked away from the fueling area while fueling. It was not a safe practice when the Grievant auto latched the nozzle and left the fueling area. Indeed, the Grievant's safety training had included the instruction to "always stay with your vehicle...for the entire filling operation." But if the County wishes to enforce a no-auto latch rule, it will need to reiterate to employees that this is a rule it intends to consistently enforce.

2. Leaving the Fueling Area After Fueling

Once the Grievant returned to the fueling area and noticed the diesel spill, he reported the spill to one of his supervisors. The record shows that supervisor told him to clean up the spill and then report to his assigned worksite. The record also shows that the spill containers were filled with trash and that the Grievant rooted around in the containers and found some absorbent pads, which he placed on the spill. The Grievant did not

see any "oil dry" granular materials in the spill containers and therefore did not use any. From his safety training, the Grievant knew or should have known that also using "oil dry" materials would have improved the clean-up. What is important to note, however, is that the Grievant reported the spill to one of his supervisors, and that supervisor did little or nothing to ensure a safe clean-up of the area.

The County's choice of a 30-day suspension rests on its designation of the Grievant's actions as a Category 4 offense – Leaving worksite in an unsafe manner. The Arbitrator finds the record shows that while the Grievant could have done a better job with the clean-up of the diesel spill, he made an effort to abate the spill and then reported to his designated worksite as instructed by one of his supervisors. The supervisor's knowledge of the spill, and failure to do much about it, was a major contributing factor to the worksite being left in an unsafe manner. Accordingly, the Arbitrator finds the appropriate charge against the Grievant are the Category 2 charges of negligence, irresponsible attitude, and/or misfeasance, malfeasance, or nonfeasance.

The disciplinary matrix, which the Parties apparently use, though not always consistently, provides for a 10-day suspension to removal for a third

offense of a category 2 offense. The Arbitrator finds a 10-day suspension appropriate rather than a 30-day suspension because: 1) it is a "progressive" discipline compared to a 30-day suspension, given that the Grievant's previous suspensions were 3-day suspensions; 2) while the supervisor did not fulfill his duties with regard to this incident, the Grievant was the primary contributor; 3) other employees have left the fueling area while fueling and have not been disciplined; and 4) the "oil dry" materials may not have been readily available in the spill containers due to the containers being filled with trash. The Grievant, however, could have made more of an effort to obtain "oil dry" materials and use them on the spill.

In other words, the record shows a mixed set of facts and a too harsh discipline, given that the facts are mixed.

AWARD

For the reasons set out above, the grievance is sustained in part and denied in part. The County had just cause to discipline the Grievant but did not have just cause to issue him a 30-day suspension.

1. The Grievant's 30-day suspension shall be changed in his record to a 10-day suspension.

2. The County shall reimburse the Grievant for lost wages, less appropriate deductions including union dues. Lost wages and all other reimbursements shall be based as if the Grievant's suspension took place during the first 10 days of his suspension.

3. The County shall reimburse the Grievant for any holiday pay or premium pay he would have been entitled to.

4. The County shall replenish all leave balances that would have accrued.

5. The County shall recalculate the Grievant's seniority to reflect a 10-day suspension rather than a 30-day suspension.

6. The County shall reimburse the Grievant for any overtime he missed.

The Arbitrator retains jurisdiction through June 20, 2016 over remedy only.

April 20, 2016

Susan Grody Ruben
Arbitrator